CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 33 FEBRUARY 3, 1999 NO. 5

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 1–1999)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of December 1998 follow. The last notice was published in the CUSTOMS BULLETIN on December 23, 1998.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: January 20, 1999.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9800260	19981208	20181016	MAJOR LEAGUE BASEBALL FEATURING KEN GRIFFEY, JR	NINTENDO OF AMERICA, INC.	N
COP9800261	19981215	20181212	SAFARI COLLECTION, MAJESTIC LION DESIGN 030731	UNITED WEAVERS, INC.	N
COP9800262	19981215	20181212	SAFARI COLLECTION, DOUBLE PANTHER DESIGN 030316	UNITED WEAVERS, INC.	N
COP9800263	19981215	20181212	SAFARI COLLECTION, WHITE TIGER DESIGN 030023	UNITED WEAVERS, INC.	N
COP9800264	19981231	20181231	7504-148 HUMMINGBIRD WITH MULTICOLOR SHAPE	CHU HUANG LUNG	N
COP9800265	19981231	20181231	7182-082 ROOSTER	CHU HUANG LUNG	N
COP9800266	19981231	20181231	7456-147 VINEYARD BANK LAMP	CHU HUANG LUNG	N
COP9800267	19981231	20181231	7460-148 DRAGONFLY TABLE LAMP	CHU HUANG LUNG	N
COP9800268	19981231	20181231	7455-147 DRAGONFLY BANK LAMP	CHU HUANG LUNG	N
COP9800269	19981231	20181231	BUTTERFLY TABLE LAMP 7459-148	CHU HUANG LUNG	N
COP9800270	19981231	20181231	7309-112 SITTING PIG	CHU HUANG LUNG	N
COP9800271	19981231	20181231	16885/16055	BOSTON BAG COMPANY OF NEW YORK	N
COP9800272	19981231	20181231	JUST LIKE DAD	WALTER FRENCH HORTON	N
COP9800273	19981231	20090425	CRAWLING SOLDIER	REGENCY MERCHANDISE INC.	N
SUBTOTAL RECORDATION TYPE			14		
TMK9801092	19981201	20020623	OUT-WOODS BY ALDO ROSSINI	OLEM SHOE CORPORATION	N
TMK9801093	19981201	20020724	BIG YANK AND DESIGN	GARMENTEX INTERNATIONAL INC.	N
TMK9801094	19981203	20080407	APOLLO	F. ZIMMERMANN GMBH & CO. KG	N
TMK9801095	19981203	20080602	CASSOMAT	F. ZIMMERMANN GMBH & CO. KG	N
TMK9801096	19981203	20030309	THE WRINKLED EGG	THE WRINKLED EGG	N
TMK9801097	19981203	20080331	RED COW	WISCON CORPORATION	N
TMK9801098	19981203	20071021	EARL JEAN	EARL JEAN	N
TMK9801099	19981203	20071014	CONFIGURATION OF A TALL TOP HAT FORMED BY A CYLINDRICAL	COTT MANUFACTURING COMPANY	N
TMK9801100	19981203	20051003	BONE	JEFFREY A. SMITH	N
TMK9801101	19981207	20081020	RAMEX	RAMEX RECORDS, INC.	N
TMK9801102	19981207	20081020	RAMEX STYLIZED LETTERS	RAMEX RECORDS, INC.	N
TMK9801103	19981207	20071215	BAD BOY CLUB AND DESIGN	PLATYPUS WEAR, INC.	N
TMK9801104	19981208	20070318	BAD BOY	PLATYPUS WEAR, INCE.	N
TMK9801105	19981208	20061105	FACE DESIGN	PLATYPUS WEAR, INC.	N
TMK9801106	19981208	20030720	CAVIAR	WESTERN DIGITAL CORPORATION	N
TMK9801107	19981208	20050722	WESTERN DIGITAL	WESTERN DIGITAL CORPORATION	N
TMK9801108	19981208	20061231	DL 2000	CARSON PRODUCTS COMPANY	Y
TMK9801109	19981208	20061203	BEAUTIFUL BEGINNINGS	CARSON PRODUCTS COMPANY	Y
TMK9801110	19981208	20030105	DARK & NATURAL	CARSON PRODUCTS COMPANY	Y
TMK9801111	19981208	20080313	LET'S JAM & DESIGN	CARSON PRODUCTS COMPANY	Y
TMK9801112	19981208	19990327	DARK & LOVELY & DESIGN	CARSON PRODUCTS COMPANY	Y
TMK9801113	19981208	20051008	DARK & LOVELY EXCELLE	CARSON PRODUCTS COMPANY	Y
TMK9801114	19981208	20021204	MAGIC	CARSON PRODUCTS COMPANY	Y
TMK9801115	19981208	20080630	ABO	LEE N. BISHOP	N
TMK9801116	19981215	20070805	MOUNTAIN GEAR AND DESIGN	MOUNTAIN GEAR INC.	N
TMK9801117	19981215	20080929	CHAMPANTIE	JA-BER TRADING CO.,INC.	N
TMK9801118	19981215	20021201	EL PATO AND DESIGN	WALKER FOODS INC.	N
TMK9801119	19981215	20081006	FLIP "N" GRIP	PARETO CORPORATION	N
TMK9801120	19981229	20090124	NESTLE AND DESIGN	SOCIETE DES PRODUITS NESTLE S.A.	N
TMK9801121	19981229	20070212	MOUNTAIN	BROWN & HALEY	N
TMK9801122	19981231	20080310	EGRET BRAND HSIN HUA RICE VERMICELLI	FUJIAN PROVINCIAL CEREALS, OIL &	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
SUBTOTAL RECORDATION TYPE			31		
TOTAL RECORDATIONS ADDED THIS MONTH			45		

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 20, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF INSULATED FOODSTUFF CONTAINERS WITH OUTER LAYER OF FABRIC-BACKED PLASTICS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the tariff classification of insulated foodstuff containers. The merchandise consists of portable, soft-sided, insulated bags that are primarily designed to store and preserve food and/or beverages. The outer layer of each bag is composed of a textile fabric that has been coated, covered or laminated with non-cellular (compact) plastics. The plastic surface of the outer layer faces outward. Comments are invited with respect to the correctness of the proposed revocations.

DATE: Comments must be received on or before March 5, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to, and may be inspected at, the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the tariff classification of insulated foodstuff containers. Customs invites comments as to the correctness of the proposed revocations.

In three Headquarters Ruling Letters (HQ), i.e., HQ 960997 and HQ 961357, both dated June 18, 1998, and HQ 960938, dated November 14, 1997 (set forth as "Attachments A, B, and C" to this document), the merchandise at issue was classified in subheading 3924.10.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other."

Customs has recently become aware that the articles each possessed an exterior layer composed not solely of plastics, but of fabric-backed compact plastics. It is now Customs position that the merchandise is properly classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up [textile] articles * * *: Other: Other: Other, Other: Other."

Customs intends to revoke HQ 960997, HQ 961357, and HQ 960938, in order to classify the merchandise in subheading 6307.90.9989, HTSUSA. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 962242, HQ 962243, and HQ 962296, revoking HQ 960997, 961357, and 960938, respectively, are set forth as "Attachments D, E, and F" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 19, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, June 18, 1998.
CLA–2 RR:CR:TE 960997 GGD
Category: Classification
Tariff No. 3924.10.50

MS. SANDY M. RICKERT
E. BESLER & COMPANY
Post Office Box 66361
Chicago, IL 60666–0361

Re: Portable, Soft-Sided, Insulated Cooler Bag; *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997); Outer Surface of Plastics.

DEAR MS. RICKERT:

This letter is in response to your request of September 15, 1997, on behalf of your client, LTD Commodities, Inc., concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a soft-sided, polyvinyl chloride (PVC), insulated cooler bag manufactured in either Taiwan or China. A sample was submitted with your request.

Facts:

The sample, described as a "Tote/Organizer," is a portable, soft-sided, insulated cooler bag that is primarily designed to store and preserve food and/or beverages. The bag measures approximately 9 inches in height by 17 inches in width by 8½ inches in depth, and is fitted on the interior of the lid with open mesh pockets. Although said to have an outer surface composed of nylon, both the outer surface and inner lining of the sample bag (which is waterproof) are composed of PVC plastics. The PVC outer surface is embossed to resemble nylon material. Between the two layers of PVC is a layer of cellular plastic foam insulation material. The bag has a carrying strap of woven polypropelene and a zippered closure extends around the top flap on three sides. There are two open pockets extending the full width of the front and back of the bag's exterior.

Style 2605COW measures approximately 10½ inches in height by 7 inches in width by 4¼ inches in depth (with gussets fully expanded). The bag has a nylon web carrying strap and a hook and loop fabric fastener which secures the top flap. The bag's outer surface and its inner lining are composed of vinyl. Between these two layers is a layer of plastic foam insulation material.

Style 2679COW also has an outer surface and inner lining composed of vinyl, with a layer of plastic foam insulation between the two layers. The bag measures approximately 6½ inches in height by 8 inches in width by 6 inches in depth (fully expanded). This bag has a main compartment (which measures approximately 6¼ inches in height by 7½ inches in width by 3¾ inches in depth) and a smaller, sandwich-sized compartment. Both compartments have zippered closures and the bag also has a nylon web carrying strap.

Issue:

Whether the portable, soft-sided, vinyl, insulated cooler bags are classified under heading 4202, HTSUS, as containers used to organize, store, protect and carry various items; or are classified under heading 3924, HTSUS, as a container with outer surface of plastics to which the principles of the decision in *SGI, Incorporated v. United States* apply.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

The classification of certain portable, soft-sided, insulated cooler bags with outer surface of plastics, was recently examined by the Court of Appeals for the Federal Circuit (CAFC) in

SGI, Incorporated v. United States, 122 F.3d 1468 (Fed. Cir. 1997). The CAFC focused on whether food or beverages were involved with the *eo nomine* exemplars set forth in the tariff provisions at issue and, without discussion of heading 4202 exemplars that organize, store, protect, and/or carry food or beverages, the CAFC held that the appropriate classification for the cooler bags was subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The Court stated that this classification "does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages." The exemplars (specifically enumerated in subheading 3924.10.10) which the Court noted in particular were the "various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food."

This office concluded that the CAFC's decision in *SGI* should be implemented. Instructions were issued to Customs field personnel on March 18, 1998 (and approved for dissemination to members of the importing community), which expressly extended the principles of the CAFC's decision to portable, hard or soft-sided, insulated coolers and similar insulated containers with outer surface of plastics or with outer surfaces composed in whole or in part of textile materials (the latter of which are classified in subheading 6307.90.99, HTSUS); and to such articles that feature exterior or interior pockets, webbing, straps, etc., for the purpose of containing items in addition to foodstuffs, provided that the additional features do not alter the container's primary purpose to store and preserve food and/or beverages.

In light of the principles of the *SGI* decision and the instructions noted above, we find that since the subject lunch bags with outer surfaces of plastics are insulated container whose primary purpose is to store and preserve food and/or beverages, they are similar to the soft-sided insulated cooler bags that were subject to the decision by the CAFC in *SGI*. The bags are therefore classified in subheading 3924.10.50, HTSUS.

Holding:

The portable, soft-sided, vinyl, insulated lunch bags identified by styles 2605COW and 2679COW are classified in subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The general column one duty rate is 3.4 percent ad valorem.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, June 18, 1998.
CLA-2 RR:CR:TE 961357 GGD
Category: Classification
Tariff No. 3924.10.50

JOEL K. SIMON, ESQUIRE
SERKO & SIMON
1 World Trade Center, Suite 3371
New York, NY 10048

Re: Portable, Soft-Sided, Vinyl, Insulated Lunch Bags; *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997); Outer Surface of Plastics.

DEAR MR. SIMON:

This letter is in response to your request of January 27, 1998, on behalf of your client, La Rue Distributors, Inc., concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of soft-sided, vinyl, insulated lunch bags manufactured in Hong Kong. Samples were submitted with your request.

Facts:

The two samples, described as "cooler bags" and identified as styles 2605COW and 2679COW, are portable, soft-sided, insulated bags which are primarily designed to store

and preserve food and/or beverages. Both bags are imprinted with designs and logos related to the National Football League, the Dallas Cowboys, and ABC's television program "Monday Night Football." Although described as "cooler bags," the bags are apparently ill-suited to contain melting ice, and they promptly leak at the seams when water is added.

Issue:

Whether the portable, soft-sided, vinyl, insulated bag is classified under heading 4202, HTSUS, as a container used to organize, store, protect and carry various items; or under heading 3924, HTSUS, as a container with outer surface of plastics to which the principles of the decision in *SGI, Incorporated v. United States* apply.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

The classification of certain portable, soft-sided, insulated cooler bags with outer surface of plastics, was recently examined by the Court of Appeals for the Federal Circuit (CAFC) in *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997). The CAFC focused on whether food or beverages were involved with the *eo nomine* exemplars set forth in the tariff provisions at issue and, without discussion of heading 4202 exemplars that organize, store, protect, and/or carry food or beverages, the CAFC held that the appropriate classification for the cooler bags was subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The Court stated that this classification "does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages." The exemplars (specifically enumerated in subheading 3924.10.10) which the Court noted in particular were the "various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food."

This office concluded that the CAFC's decision in *SGI* should be implemented. Instructions were issued to Customs field personnel on March 18, 1998 (and approved for dissemination to members of the importing community), which expressly extended the principles of the CAFC's decision to portable, hard or soft-sided, insulated coolers and similar insulated containers with outer surface of plastics or with outer surfaces composed in whole or in part of textile materials (the latter of which are classified in subheading 6307.90.99, HTSUS); and to such articles that feature exterior or interior pockets, webbing, straps, etc., for the purpose of containing items in addition to foodstuffs, provided that the additional features do not alter the container's primary purpose to store and preserve food and/or beverages.

In light of the principles of the *SGI* decision and the instructions noted above, we find that the bag's interior mesh pockets and exterior open pockets do not alter the insulated container's primary purpose to store and preserve food and/or beverages. The gas is similar to the soft-sided, insulated cooler bags that were the subject of the CAFC's decision in SGI. The "Tote/Organizer" is therefore classified in subheading 3924.10.50, HTSUS.

Holding:

The portable, soft-sided, PVC, insulated cooler bag identified as the "Tote/Organizer" is classified in subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The general column one duty rate is 3.4 percent ad valorem.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, November 14, 1997.

CLA–2 RR:TC:TE 960938 jb
Category: Classification
Tariff No. 3924.10.5000

CINDY SHAHAMAT
SCHENKER INTERNATIONAL, INC.
4700 Lima Street
Denver, CO 80239–0945

Re: Request for Reconsideration of PD A88672 and HQ 960184; insulated casserole dish caddie bag; *SGI, Incorporated v. United States*, 122 F.3d 1468, Slip Op. 96–1272, decided September 5, 1997.

DEAR MS. SHAHAMAT:

This is in response to your letter, dated November 3, 1997, on behalf of your client, Tops of Rockies Marketing, requesting reconsideration of HQ 960184, dated September 4, 1997, which classified an insulated casserole dish caddie bag in heading 4202, Harmonized Tariff Schedule of the United States (HTSUS). A sample was submitted to this office for examination.

Facts:

In HQ 960184 this office addressed an earlier request submitted by you for reconsideration of Port Decision (PD) A88672, dated November 6, 1996, which classified the subject merchandise in heading 4202, HTSUS. At that time we stated that we were affirming the holding in PD A88672. That is, the proper classification of the subject merchandise was heading 4202, HTSUS. You maintain that the proper classification for this merchandise is heading 3924, HTSUS.

The merchandise was described in HQ 960184 as an insulated casserole dish caddie bag, measuring approximately 3 inches by 10 inches by 16 inches, with an outer surface of PVC plastic sheeting. The bag features two interior pouch pockets with hook and loop type fasteners and two webbed textile strap handles. The bag is stated to transport and serve food and features a pouch at the bottom of the caddie for the storage of a removable cold pack.

We note that although the bag that was the subject of HQ 960184 was described as featuring two interior pockets, the bag submitted with your present request only features one interior pocket.

Issue:

Whether the subject merchandise is properly classified in heading 4202, HTSUS, or heading 3924, HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI's will be applied, in the order of their appearance.

Prior to the decision in *SGI, Incorporated v. United States*, there were two plausible classifications for this merchandise: heading 4202, HTSUS, which provides for, among other things, traveling bags and similar articles, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper, and heading 3924, HTSUS, which provides for, among other things, tableware, kitchenware, other household articles and toilet articles, of plastic. As such, in HQ 960184, this office determined in accordance with applicable administrative precedent that the proper classification for this merchandise was heading 4202, HTSUS.

However, on September 5, 1997, the Court of Appeals for the Federal Circuit (CAFC), in *SGI, Incorporated v. United States*, found that the classification for this merchandise is in heading 3924, HTSUS. The CAFC stated, "we again must focus on whether food or beverages are involved in the *eo nomine* exemplars set forth in the provisions in the HTSUS at issue." Finding that the exemplars of heading 4202 did not include containers that orga-

nize, store, protect, or carry food or beverages, the CAFC held that the appropriate classification for the coolers was subheading 3924.10.50, HTSUSA, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The Court stated that this classification "does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages." The heading 3924 exemplars (specifically, those enumerated in subheading 3924.10.10) which the Court noted in particular were the "various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food."

As such, by operation of law, the Court's determination effected a change in the classification of the subject merchandise from heading 4202, HTSUS, to heading 3924, HTSUS. We note that the exemplar containers of heading 3924, HTSUS, cited above are used as dispensers and contain **only** specific foodstuffs, not additional "various items" which are designed to organize, store, protect, and carry. Thus, the subject merchandise, which is similarly designed to carry food (substantiated by its insulation properties and a pouch specifically designed to carry a removable cold pack), is per the Court's decision, appropriately classified in heading 3924, HTSUS.

A copy of this ruling in addition to HQ 960184 should be presented at the port with the subject merchandise at the time of entry.

In accordance with section 152.16(e), Customs Regulations (19 C.F.R. §152.16(e)), unless the Customs Service directs otherwise, the principles of any court decision adverse to the Government will be applied to unliquidated entries and protested entries which have not been denied in whole or in part and in which the same issue is involved as soon as the time within which an application for a rehearing or review may be filed has expired without such application having been made. No application for rehearing or review has been made and none will be made. However, the Customs Service has issued field instructions regarding this matter. A copy is enclosed for you information.

Holding:

SGI, Incorporated v. United States, revoked PD A88672 and HQ 960184 by operation of law. The proper classification for this merchandise is now in subheading 3924.10.5000, HTSUSA, which provides for tableware, kitchenware, other household articles and toilet articles, of plastics: tableware and kitchenware: other. The applicable rate of duty is 3.4 percent ad valorem.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 962242 GGD
Category: Classification
Tariff No. 6307.90.9989

MS. SANDY M. RICKERT
E. BESLER & COMPANY
Post Office Box 66361
Chicago, IL 60666–0361

Re: Revocation of Headquarters Ruling Letter (HQ) 960997; Portable, Soft-Sided, Insulated Cooler Bag; *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997); Outer Layer of Fabric-backed, Compact Plastics.

DEAR MS. RICKERT:

In Headquarters Ruling Letter (HQ) 960997, issued to you June 18, 1998, on behalf of LTD Commodities, Inc., Customs classified a soft-sided, insulated cooler bag in subheading 3924.10.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the

provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." We have reviewed that ruling and have found it to be in error. Therefore, this ruling revokes HQ 960997.

Facts:

In your initial request for a binding ruling, dated September 15, 1997, the merchandise at issue was described as a "Tote/Organizer" composed of 100 percent nylon with a PVC (polyvinyl chloride) lining. In HQ 960997, this office noted that the sample bag had an outer surface composed of PVC plastics embossed to resemble nylon material. It was subsequently determined that the PVC actually comprises the outward facing surface of a layer composed of a nylon woven fabric that is coated, covered or laminated with PVC, a non-cellular (compact) plastic.

The "Tote/Organizer" is a portable, soft-sided, insulated cooler bag that is primarily designed to store and preserve food and/or beverages. The bag measures approximately 9 inches in height by 17 inches in width by 8½ inches in depth, and is fitted on the interior of the lid with open mesh pockets. The inner lining of the bag (which is waterproof) is composed solely of PVC plastics. Between the outer layer and the lining is a layer of cellular plastic foam insulation material. The bag has a carrying strap of woven polypropelene. A zippered closure extends around the top flap on three sides. There are two open pockets extending the full width of the front and back of the bag's exterior.

Issue:

Whether the insulated cooler bag is classified under heading 3924, HTSUSA, as a container with outer surface of plastics, or under heading 6307, HTSUSA, as an other made up (textile) article with outer surface of fabric-backed compact plastics.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

As noted in HQ 960997, the classification of certain portable, soft-sided, insulated cooler bags with outer surface of plastics, was examined by the Court of Appeals for the Federal Circuit (CAFC) in *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997). The CAFC focused on whether food or beverages were involved with the *eo nomine* exemplars set forth in the tariff provisions at issue and, without discussion of heading 4202 exemplars that organize, store, protect, and/or carry food or beverages, the CAFC held that the appropriate classification for the cooler bags was subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The Court stated that this classification "does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages." The exemplars (specifically enumerated in subheading 3924.10.10) which the Court noted in particular were the "various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food."

This office concluded that the CAFC's decision in *SGI* should be implemented. Instructions were issued to Customs field personnel on March 18, 1998, and September 10, 1998 (and approved for dissemination to members of the importing community), by which the principles of the CAFC's decision were expressly extended to portable, hard or soft-sided, insulated coolers and similar insulated containers (whose primary purpose is to store and preserve food and/or beverages), with outer surface of plastics and with outer surface of textile materials (classified in subheading 6307.90.99**05**, 6307.90.99**07**, or 6307.90.99**09**, HTSUSA, depending upon whether the outer surface is composed of cotton, man-made fibers, or other textile materials, respectively).

The instruction issued on September 10, 1998, expressly extended the principles of the CAFC's decision to foodstuff-related, insulated containers whose exterior layer is composed of a textile fabric that is coated, covered or laminated with compact plastics, with the plastic surface of the layer facing outward. Such containers are classified in subheading

6307.90.9989, HTSUSA, a provision which is currently not subject to quota/visa requirements. In light of the principles of the *SGI* decision, the instructions noted above, and the fact that the subject cooler bag has an outer layer that is composed of fabric-backed compact plastics, the "Tote/Organizer" is classified in subheading 6307.90.9989, HTSUSA.

Holding:

The portable, soft-sided, insulated cooler bag described as a "Tote/Organizer" is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up [textile] articles, including dress patterns: Other: Other: Other, Other: Other." The general column one duty rate is 7 percent ad valorem.

HQ 960997, issued June 18, 1998, is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 962243 GGD
Category: Classification
Tariff No. 6307.90.9989

JOEL K. SIMON, ESQUIRE
SERKO & SIMON
1 World Trade Center, Suite 3371
New York, NY 10048

Re: Revocation of Headquarters Ruling Letter (HQ) 961357; Portable, Soft-Sided, Insulated Cooler Bags; *SGI, Incorporated v. United States,* 122 F.3d 1468 (Fed. Cir. 1997); Outer Layer of Fabric-backed, Compact Plastics.

DEAR MR. SIMON:

In Headquarters Ruling Letter (HQ) 961357, issued to you June 18, 1998, on behalf of La Rue Distributors, Inc., Customs classified a soft-sided, insulated cooler bag in subheading 3924.10.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." We have reviewed that ruling and have found it to be in error. Therefore, this ruling revokes HQ 961357.

Facts:

In your initial request for a binding ruling, dated January 27, 1998, the two samples at issue were described, in pertinent part, as portable, **vinyl**, soft-sided, insulated cooler bags. Subsequent to the issuance of HQ 961357, it was determined that the vinyl outer surface of each bag actually comprised the outward facing surface of a layer composed of a textile fabric that had been coated, covered or laminated with vinyl, a non-cellular (compact) plastic.

The two samples, identified as styles 2605COW and 2679COW, are insulated bags which are primarily designed to store and preserve food and/or beverages. Both bags are imprinted with designs and logos related to the National Football League, the Dallas Cowboys, and ABC's television program "Monday Night Football." Between the fabric-backed, vinyl outer layer and the vinyl inner lining of each bag is a layer of plastic foam insulation material. The bags appear ill-suited to contain melting ice, as they leak at the seams when water is added. Each bag has a nylon web carrying strap.

Style 2605COW measures approximately 10½ inches in height by 7 inches in width by 4¼ inches in depth (with gussets fully expanded). The bag has a hook and loop fabric fastener which secures the top flap. Style 2679COW measures approximately 6½ inches in height by 8 inches in width by 6 inches in depth (fully expanded). This bag has a main compartment (which measures approximately 6¼ inches in height by 7½ inches in width by 3¾

inches in depth) and a smaller, sandwich-sized compartment. Both compartments have zippered closures.

Issue:

Whether the insulated cooler bags are classified under heading 3924, HTSUSA, as containers with outer surface of plastics, or under heading 6307, HTSUSA, as other made up (textile) articles with outer surface of fabric-backed compact plastics.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

As noted in HQ 961357, the classification of certain portable, soft-sided, insulated cooler bags with outer surface of plastics, was examined by the Court of Appeals for the Federal Circuit (CAFC) in *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997). The CAFC focused on whether food or beverages were involved with the *eo nomine* exemplars set forth in the tariff provisions at issue and, without discussion of heading 4202 exemplars that organize, store, protect, and/or carry food or beverages, the CAFC held that the appropriate classification for the cooler bags was subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The Court stated that this classification "does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages." The exemplars (specifically enumerated in subheading 3924.10.10) which the Court noted in particular were the "various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food."

This office concluded that the CAFC's decision in *SGI* should be implemented. Instructions were issued to Customs field personnel on March 18, 1998, and September 10, 1998 (and approved for dissemination to members of the importing community), by which the principles of the CAFC's decision were expressly extended to portable, hard or soft-sided, insulated coolers and similar insulated containers (whose primary purpose is to store and preserve food and/or beverages), with outer surface of plastics and with outer surface of textile materials (classified in subheading 6307.90.99**05**, 6307.90.99**07**, or 6307.90.99**09**, HTSUSA, depending upon whether the outer surface is composed of cotton, man-made fibers, or other textile materials, respectively).

The instruction issued on September 10, 1998, expressly extended the principles of the CAFC's decision to foodstuff-related, insulated containers whose exterior layer is composed of a textile fabric that is coated, covered or laminated with compact plastics, with the plastic surface of the layer facing outward. Such containers are classified in subheading 6307.90.9989, HTSUSA, a provision which is currently not subject to quota/visa requirements. In light of the principles of the *SGI* decision, the instructions noted above, and the fact that the subject cooler bags each have an outer layer that is composed of fabric-backed compact plastics, styles 2605COW and 2679COW are classified in subheading 6307.90.9989, HTSUSA.

Holding:

The portable, soft-sided, insulated cooler bags identified by styles 2605COW and 2679COW are classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up [textile] articles, including dress patterns: Other: Other: Other, Other: Other." The general column one duty rate is 7 percent ad valorem.

HQ 961357, issued June 18, 1998, is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 962296 GGD
Category: Classification
Tariff No. 6307.90.9989

MS. CINDY SHAHAMAT
SCHENKER INTERNATIONAL, INC.
4700 Lima Street
Denver, CO 80239-0945

Re: Revocation of Headquarters Ruling Letter (HQ) 960938; Insulated Casserole Dish Caddie Bag; *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997); Outer Layer of Fabric-backed, Compact Plastics.

DEAR MS. SHAHAMAT:

In Headquarters Ruling Letter (HQ) 960938, issued to you November 14, 1997, on behalf of Tops of Rockies Marketing, Customs classified an insulated casserole dish caddie bag in subheading 3924.10.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." We have reviewed that ruling and have found it to be in error. Therefore, this ruling revokes HQ 960938.

Facts:

By letters dated September 17 and November 3, 1997, you requested reconsideration of HQ 960184, issued to you September 4, 1997, in which this office had classified the insulated casserole dish caddie bag in subheading 4202.92.9060, HTSUSA. In your request, you described the composition of the merchandise at issue as "100% pvc" (polyvinyl chloride—a noncellular, compact plastic). In HQ 960938, based in part upon the belief that the outer layer of the caddie bag was composed solely of PVC, this office stated that a change in the classification of the caddie bag had been effected by the decision of the Court of Appeals for the Federal Circuit (CAFC) in *SGI, Incorporated v. United States*, 122 F.3d 1468 (Fed. Cir. 1997), hereinafter *SGI*, in which the CAFC held that certain soft-sided, insulated cooler bags with outer surface of plastics were properly classified in subheading 3924.10.50, HTSUSA. We have recently become aware, however, that the PVC outer surface of the casserole dish caddie bag actually comprises the outward facing surface of a layer composed of a textile woven fabric that is coated, covered or laminated with PVC plastic.

The casserole dish caddie bag measures approximately three inches in height by 16 inches in width by ten inches in depth. It features webbed textile carrying handles, a zippered closure extending along the top front and sides, and an interior pouch pocket (for insertion of a removable cold pack) with hook and loop fabric fasteners. The bag is a portable, soft-sided, insulated container that is primarily designed to store and preserve foodstuffs.

Issue:

Whether the insulated casserole dish caddie bag is classified under heading 3924, HTSUSA, as a container with outer surface of plastics, or under heading 6307, HTSUSA, as an other made up (textile) article with outer surface of fabric-backed compact plastics.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

As in HQ 960938 and above, the classification of certain portable, soft-sided, insulated cooler bags with outer surface of plastics, was examined by the CAFC in *SGI*. The CAFC focused on whether food or beverages were involved with the *eo nomine* exemplars set forth

in the tariff provisions at issue and, without discussion of heading 4202 exemplars that organize, store, protect, and/or carry food or beverages, the Court held that the appropriate classification for the cooler bags was subheading 3924.10.50, HTSUS, the provision for "Tableware, kitchenware, other household articles * * * of plastics: Tableware and kitchenware: Other." The Court stated that this classification "does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages." The exemplars (specifically enumerated in subheading 3924.10.10) which the Court noted in particular were the "various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food."

This office concluded that the CAFC's decision in *SGI* should be implemented. Instructions were issued to Customs field personnel on March 18, 1998, and September 10, 1998 (and approved for dissemination to members of the importing community), by which the principles of the CAFC's decision were expressly extended to portable, hard or soft-sided, insulated coolers and similar insulated containers (whose primary purpose is to store and preserve food and/or beverages), with outer surface of plastics and with outer surface of textile materials (classified in subheading 6307.90.99**05**, 6307.90.99**07**, or 6307.90.99**09**, HTSUSA, depending upon whether the outer surface is composed of cotton, man-made fibers, or other textile materials, respectively).

The instruction issued on September 10, 1998, expressly extended the principles of the CAFC's decision to foodstuff-related, insulated containers whose exterior layer is composed of a textile fabric that is coated, covered or laminated with compact plastics, with the plastic surface of the layer facing outward. Such containers are classified in subheading 6307.90.9989, HTSUSA, a provision which is currently not subject to quota/visa requirements. In light of the principles of the *SGI* decision, the instructions noted above, and the fact that the casserole dish caddie bag has an outer layer that is composed of fabric-backed compact plastics, the article is classified in subheading 6307.90.9989, HTSUSA.

Holding:

The soft-sided, insulated, casserole dish caddie bag is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up [textile] articles, including dress patterns: Other: Other: Other, Other: Other." The general column one duty rate is 7 percent ad valorem.

HQ 960938, issued November 14, 1997, is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING RELATING TO COUNTRY OF ORIGIN MARKING REQUIREMENTS OF WATCH CASES AND REVOCATION OF CUSTOMS RULING RELATING TO MARKING REQUIREMENTS OF CLOCK MOVEMENTS AND CASES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter concerning country of origin marking of watch cases and revocation of ruling letter concerning marking of clock cases and movements.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a prior Customs ruling pertaining to the country of origin marking of watch cases and revoking a prior Customs ruling relating to country of origin marking of clock cases and movements. Notice of the proposed action was published July 29, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 30.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse on or after April 5, 1999.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch, (202) 927–1034.

SUPPLEMENTARY INFORMATION

BACKGROUND

Section 134.43(b), Customs Regulations (19 CFR 134.43(b)), in conjunction with section 11.9, Customs Regulations (19 CFR 11.9), provides that watches and clocks must be marked in accordance with the special requirements of Chapter 91, Additional U.S. Note 4, Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202). This note requires that any watch/clock movement or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised), as specified in the provisions of the Note. Since these special marking requirements for watches/clocks are Congressionally enacted, the Customs Service has no authority to grant exceptions.

On July 29, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 30, proposing to modify Headquarters Ruling Letter (HRL) 560457 dated August 4, 1997, and revoke NY 815146 dated October 10, 1995. Customs had previously ruled in HRL 560457 that marking on the back of a watch case in permanent indelible ink was an acceptable marking for purposes of the special marking require-

ments. In NY 815146, Customs had ruled that marking with permanent indelible ink on the back of clock cases would be allowable for purposes of the special marking requirements.

Customs stated in the notice that the prior rulings were in error as marking watch/clock movements and cases with indelible ink is not among the methods specified in Additional U.S. Note 4 ("Note 4").

Three comments were received in response to the notice of intent to revoke NY 815146 and modify HRL 560457. All three of the commenters are of the opinion that Customs is defining the term "stamping" too narrowly, that "stamping" under the special marking requirements should follow the standard dictionary definition which refers to the act of imprinting and impressing, which includes indelible ink marking by rubber stamp, and that "stamping" should not be interpreted as requiring that the marking be indented or raised. One commenter notes that indelible ink is a durable marking agent, and would be acceptable for use in connection with external country of origin marking for watches under 19 U.S.C. 1304.

A second commenter notes that the law was changed in 1988 (P.L. 88–418) to add "mold-marking (either indented or raised)" as an allowable marking. This commenter therefore concludes that the parenthetical "(either indented or raised)" applies only to "mold-marking" and not to "stamping." One of the commenters believes that if stamping were intended to include only "die-stamping," as is required of certain metal articles under 19 CFR 134.43(a), Note 4 would have so specified that form of "stamping." This commenter also believes that die-sinking the required information on a metal plate which then is permanently attached to the surface of the clock movement will satisfy the special marking requirements.

Cutting, die-sinking, engraving and mold-marking are forms of marking which create a permanent impression in the surface of the watch/clock case or movement. It is Customs opinion that "stamping" was also intended to provide a similar result, but through the use of a different tool or conveyance. The fact that "mold-marking" which also leaves a permanent impression in the surface of the watch or clock was subsequently added to the allowable forms of marking reinforces Customs position that each of the methods of marking under these requirements, including "stamping", was intended to create a permanent impression in the surface of the watch/clock case or movement.

Further, as noted, the specific language of the note requires that the movement or case of the clock or watch be "conspicuously and indelibly marked by cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised). * * *" Marking a metal plate by one of the prescribed methods and then affixing the plate to the case or movement does not satisfy these requirements, as the specific language requires that the marking be applied directly to the surface of the watch/clock case or movement. Customs has no authority to grant an exception to the statutory marking requirements under Note 4.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 815146 and modifying HRL 560457 to reflect that marking with indelible ink is not among the methods of marking specified in the special marking requirements of Note 4. HRL 561066, which modifies HRL 560457, and HRL 560881, which revokes NY 815146, are set forth as Attachment A and Attachment B, respectively, to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 13, 1999.

MYLES HARMON,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, January 13, 1999.

MAR–05 RR:CR:SM 561066 BLS
Category: Marking
Tariff No. Subheading 9111.90.70

ROBERT L. EISEN, ESQ.
CLAIRE R. KELLY, ESQ.
COUDERT BROTHERS
1114 Avenue of the Americas
New York, NY 10036–7703

Re: Modification of HRL 560457; special marking requirements for watches; watch cases; Additional U.S. Note 4, Chapter 91, HTSUS.

DEAR MR. EISEN AND MS. KELLY:

This is in further reference to your letter dated May 6, 1997, on behalf of E. Gluck Corporation ("E. Gluck"), in which you requested a ruling concerning the special marking requirements under Additional U.S. Note 4, Chapter 91, Harmonized Tariff Schedule of the United States (HTSUS), as applied to certain watch cases. We issued Headquarters Ruling Letter (HRL) 560457 (August 4, 1997) in response to your request.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of HRL 560457 was published on July 29, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 30.

Facts:

E. Gluck is an importer of mens' and ladies' musical quartz analog watches. The watch cases for these musical watches are made in China and comprised of a base metal plate, a

circular stainless steel (or plastic) outer case back and a circular "transducer" (a device used to convert energy from one form to another). You state that the transducer is permanently affixed to the outer case back by means of a double-sided industrial adhesive tape specifically formulated for this application, and that the parts cannot be separated without considerable effort. It is also our understanding that the case back has six evenly spaced openings molded into the metal, and the transducer covers all six openings when it is affixed. An inspection of the sample confirms that the two parts are permanently affixed as represented.

When the case back is placed on the case (and the transducer and outer case back are pressed flush to the movement) the transducer element of the case back is able to convert electrical signals from the movement in the watch into sound energy in order to provide the musical feature in the watch.

E. Gluck proposes to mark the watch cases **"E. Gluck Corp., China"** on the inside of the case back (on the transducer portion or inner case back) by means of a permanent indelible ink stamp.

Issue:

Whether the proposed marking satisfies the special marking requirements under Additional U.S. Note 4.

Law and Analysis:

Additional U.S. Note 4, Chapter 91, Harmonized Tariff Schedule of the United States (HTSUS) ("Note 4"), requires that any watch/clock movement, or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised), as specified in the provisions of this note.

In HRL 560457 dated August 4, 1997, Customs found that the transducer forms an integral part of the watch case back and therefore the case. As part of the case back, we held that the transducer is classifiable under subheading 9111.90.70, HTSUS, as other parts of watch cases. We also held that since the transducer is considered part of the case back, Note 4 may be satisfied by the marking **"E. Gluck Corp., China"** on the transducer portion of the watch case (or inner case back) by means of a permanent indelible ink stamp.

HRL 560457 is in error in holding that indelible ink marking satisfies the special marking requirements of Note 4, as it is not one of the methods of marking specified in the note. The methods of marking delineated in Note 4 are mandatory. The Customs Service has no authority for granting exceptions to the special marking requirements for watches.

Holding:

A transducer permanently affixed to the outer case back of a watch is considered part of the case back and is classifiable under subheading 9111.90.70, HTSUS, as other parts of watch cases. However, the marking **"E. Gluck Corp., China"** on the transducer portion of the watch case (inner case back) in indelible ink indicating the purchaser and country of origin of the watch case does not satisfy the special marking requirements of Note 4, HTSUS, as indelible ink marking is not one of the methods specified in the note.

HRL 560457 is hereby modified. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, January 13, 1999.

MAR-05 RR:TC:SM 560881 BLS
Category: Marking

MS. LAURIE EVERILL
JC PENNEY PURCHASING CORPORATION
P.O. Box 10001
Dallas, TX 75301-0001

Re: Special Marking Requirements pertaining to clock movement and case; revocation of NY 815146.

DEAR MS. EVERILL:

This is in further reference to your letter dated September 21, 1995, in which you requested a ruling pertaining to the special marking requirements for clock cases and movements. Samples have been submitted. Customs initially responded to your request for a ruling in a letter dated October 10, 1995 (NY 815146).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 815146 dated October 10, 1995, was published on July 29, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 30.

Facts:

The record reflects that the sample clock movement has a metal plate attached to the back plate bearing the words WEI HAIPS MADE IN CHINA The sample clock case is stamped with indelible ink bearing the words MADE IN CHINA.

In NY 815146, Customs held that marking the clock case with indelible ink and the movement with a metal tag satisfied the special marking requirements of Note 4.

Issue:

Whether the marking satisfies the special marking requirements of Additional U.S. Note 4, Harmonized Tariff Schedule of the United States (HTSUS).

Law and Analysis:

Section 134.43(b), Customs Regulations (19 CFR 134.43(b)), in conjunction with section 11.9, Customs Regulations (19 CFR 11.9), provides that clocks must be marked in accordance with the special requirements of Chapter 91, Additional U.S. Note 4 of the Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202). This note (hereinafter "Note 4") requires that any clock movement or case provided for in the subpart, whether imported separately or attached to any article provided for in the subpart, shall not be permitted to be entered unless conspicuously and indelibly marked by cutting, die-sinking, engraving, stamping or mold-marking (either indented or raised), as specified in the provisions of the Note. This marking is mandatory.

In Headquarters Ruling Letter (HRL) 559066 dated May 12, 1995, we held that printing on a clock case in ink did not satisfy the special marking requirements for clock cases because the marking was accomplished by a method other than those specified in Note 4. Under the special marking requirements, the methods of marking clock movements and clock cases are identical. *See* also HRL 734860 dated March 3, 1993 (marking on a gold foil sticker on the bottom of a clock case was not a method prescribed by the special marking requirements and the marking was not in a proper location) and HRL 559934 dated October 23, 1996 (marking with an adhesive sticker was not in accordance with the requirements of Note 4).

Accordingly, as applied to the subject case, we find that marking with indelible ink and with a metal plate do not satisfy the special marking requirements for clock cases and movements because the markings are not effected by one of the methods specified in Note 4. Unlike cutting, die-sinking, engraving, or stamping, these methods of marking do not leave a permanent impression in the clock case or movement. As previously stated, Customs has no authority to grant an exception to the statutory marking requirements under Note 4.

Holding:

Marking a clock case with indelible ink and a clock movement with a metal plate do not satisfy the special marking requirements of Note 4, as these methods of marking do not constitute cutting, die-sinking, engraving, stamping or mold-marking, the only methods of marking permitted under the Note.

NY 815146 is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF INFLATABLE ARM BANDS AND SWIM VESTS OF VINYL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of inflatable arm bands and swim vests of vinyl were under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on December 16, 1998 in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption April 5, 1999.

FOR FURTHER INFORMATION CONTACT: Michael McManus, Office of Regulations and Rulings, General Classification Branch, (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 16, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 50, proposing to modify New York Ruling Letter 829593, dated July 25, 1988, in which certain inflatable arm bands and swim vests of vinyl were classified as inflatable articles of plastic, not elsewhere specified or included, in subheading 3926.90.75, HTSUS. No comments were received in response to this notice. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as

amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NY 829593 to reflect the proper classification of inflatable arm bands and swim vests of vinyl in subheading 9506.29.0040, HTSUS, a provision for other water sports equipment. HQ 961988, modifying NY 829593, is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

Dated: January 19, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 19, 1999.

CLA–2 RR:CR:GC 961988 MGM
Category: Classification
Tariff No. 9506.29.00

MR. NED H. MARSHAK
SHARRETS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: Inflatable Arm Bands and Swim Vests; Modification of NY 829593.

MR. MARSHAK:

This is in response to your letter of June 10, 1998, on behalf of your client, Intex Recreation Corp., requesting the modification of New York Ruling Letter (NY) 829593, issued to you on July 25, 1988, in which numerous items were classified under the Harmonized Tariff Schedule of the United States (HTSUS).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed modification of NY 829593 was published December 16, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 50. No comments were received in response to this notice.

Facts:

In NY 829593, Customs ruled that inflatable arm bands and swim vests of vinyl were classified in subheading 3926.90.75, HTSUS, as inflatable articles of plastic, not elsewhere specified or included.

These vinyl inflatable arm bands (identified as item numbers 59650, 59640, 59642, 58647, 58649, 58648, 58642, 58641, 58650 in Intex's "1998 Wet Set Catalog") and swim vests (item numbers 59660, 58670, 58669, 58660) are of a type worn by children as flotation devices while swimming. The inflatable arm bands range in width from 6 to 7.5 inches, and

in length from 7.5 to 13 inches. The thickness of the arm bands varies from 8 gauge (0.2 millimeters) to 11 gauge (0.28 millimeters). The inflatable swim vests are 10 gauge (0.25 millimeters) and 11 gauge (0.28 millimeters) in thickness.

Issue:

Whether inflatable arm bands and swim vests of vinyl are classified as other inflatable articles of plastic or as water-sport equipment?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The following headings are relevant to the classification of this merchandise:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.75	Pneumatic mattresses and other inflatable articles, not elsewhere specified or included
* * * * * * *	
9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof:
9506.21	Sailboards and parts and accessories thereof:
9506.29.00	Other

This matter is governed primarily by GRI 1, in that the choice in classification is between two headings. Chapter 39, HTSUS, specifically excludes "Articles of chapter 95 (for example, toys, games, sports equipment)." Note 2(v), Ch. 39. Thus, if these articles are sports equipment of Chapter 95, they cannot be classified in Chapter 39.

Chapter 95 covers "toys of all kinds whether designed for the amusement of children or adults. It also includes equipment for indoor or outdoor games, appliances and apparatus for sports." General EN, Ch. 95. This has been construed to include flotation devices similar to the instant merchandise. *See* NY A82398, issued April 17, 1996; NY B87757, issued July 25, 1997; NY C84957, issued March 9, 1998; *See also Sports Industries, Inc. v. United States*, 65 Cust. Ct. 470, C.D. 4125 (1970) (where gloves for underwater swimming were held to be "specially designed for use in sports" under the Tariff Schedules of the United States, predecessor to the HTSUS). The flotation devices here at issue are apparati for sports and are described by heading 9506, HTSUS.

Within heading 9506, HTSUS, these goods fall within the provision for "water-sport equipment." Within this subheading, the flotation devices are "other" than "Sailboards and parts and accessories thereof."

Holding:

Inflatable arm bands and swim vests of vinyl are classified in subheading 9506.29.0040, HTSUS.

NY 829593 is modified. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or

decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SPORTS MEMORABILIA DISPLAY CASES OF PLASTICS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of display cases and holders of plastics for baseballs and hockey pucks. Notice of the proposed modification was published on December 9, 1998, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 5, 1999.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 9, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 49, proposing to modify HQ 955104, dated October 14, 1994, which classified polystyrene and acrylo nitrile butadiene styrene display cubes and holders for baseballs and hockey pucks in subheading 3926.40.00, HTSUS, which provides for other articles of plastics * * * statuettes and other ornamental articles. No comments from the public were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HQ 955104 (a ruling relating to the tariff classification of display cases and holders of plastics for baseballs and hockey pucks) to reflect the proper classification of the merchandise under subheading 3926.90.98, HTSUS, which provides for other articles of

plastic, other. Although the contents displayed by the cases and holders may be considered decorative or ornamental, the cases themselves are not. HQ 962331 modifying HQ 955104 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: January 19, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 19, 1999.

CLA-2:RR:CR:GC 962331 AML
Category: Classification
Tariff No. 3926.90.98

DISTRICT DIRECTOR OF CUSTOMS
2nd and Chestnut Streets
Room 102
Philadelphia, PA 19106-2999

Re: Display cases for sports memorabilia; NY 814263; NY 814365; HQ 955104 modified.

DEAR SIR:

This is in reference to Headquarters Ruling Letter (HQ) 955104, issued to your office on October 11, 1994, in response to Protest No. 1103-93-100496 concerning the classification of plastic display cases and holders for baseballs and hockey pucks, and protective boxes, sleeve bags, and loose-leaf pages for sports cards, pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). HQ 955104 held, in part, that plastic display cubes and holders for baseballs and hockey pucks, and holders for hockey pucks with pictures or sports cards, were classified in subheading 3926.40.00, HTSUS, which provides for other articles of plastics * * * statuettes and other ornamental articles.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), notice of the proposed modification of HQ 955104 was published on December 9, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 49. No comments from the public were received in response to this notice.

Facts:

The polystyrene cubes for holding baseballs and hockey pucks consist of two U-shaped units which slide together and snap lock to form a 3 inch cube. The holders for baseballs or hockey pucks are in the shape of those items, with pedestal bases. There are also holders which encase hockey pucks along with pictures or sports cards. The holders are made of acrylo nitrile butadiene styrene. The products were described in HQ 955104 as follows:

> The hockey puck/picture holder consists of two clear rigid plastic rectangular panels designed to be held together when inserted into a rigid plastic holder or stand. The

panel(s) have molded recesses which are form-shaped to the shape of a hockey puck and a sports card, respectively. This permits the puck and card to be sandwiched between the panels.

The last group of products covered by the instant protest consist[s] of a cube for displaying a baseball or hockey puck and a holder in the shape of a baseball or hockey puck with a pedestal. Counsel states that these products are "specifically designed to contain a single baseball or hockey puck for the express purpose of protecting the items, which usually bear autographs of baseball or hockey players, from soiling or other damage either when displayed at collector shows, or in transit to or from collector shows. The items have no other use except for the packing or housing of baseballs and[/] or hockey pucks and are sold exclusively by collectors or by collector supply stores to be a box or case which contains the autographed item."

Issue:

Whether plastic display cases and holders for baseballs and hockey pucks should be classified under subheading 3923.90.00, HTSUS, as other articles for the conveyance or packing of goods of plastic; 3926.40.00, HTSUS, as other articles of plastics * * * statuettes and other ornamental articles; or 3926.90.98, HTSUS, as other articles of plastic?

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]" When interpreting and implementing the HTSUS, the Explanatory Notes (EN's) of the Harmonized Commodity Description and Coding System may be utilized. The EN's, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See, T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The subheadings under consideration are as follows:

3923	Articles for the conveyance or packing of goods, of plastic * * *:
3923.90.00	Other.
* * * * * * *	
3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.40.00	Statuettes and other ornamental articles;
3926.90	Other.
3926.90.98	Other.

In HQ 955104, dated October 11, 1994, plastic display cubes and holders for baseballs and hockey pucks, and holders for hockey pucks with pictures or sports cards, were classified in subheading 3926.40.00, HTSUS, which provides for other articles of plastics * * * statuettes and other ornamental articles. The contents displayed by the acrylic containers may be considered to be decorative or ornamental. However, the cubes and holders, in and of themselves, cannot be considered to be ornamental; nor are they statuettes. That is, it is the item displayed within the case or holder which is ornamental, not the display case. Accordingly, the articles cannot be classified in subheading 3926.40.00, HTSUS.

The subject articles also cannot be classified under heading 3923, HTSUS, the provision for articles for the conveyance or packing of goods, because they are not of a class or kind used primarily for packing and conveying goods; they are for the storage and display of sports memorabilia. EN 39.23 makes clear that the articles covered by heading 3923 are various kinds of containers; spools, caps, bobbins, and similar supports; and stoppers, lids, cops and other closures. Such articles are not of the kind under consideration.

Inasmuch as heading 3923, HTSUS, does not describe the articles, and they cannot be classified in subheading 3926.40.00, HTSUS, or any of the other *eo nomine* provisions of heading 3926, HTSUS, they are classified in the residual provision. This is consistent with New York Rulings (NYs) 814362 and 814365, both dated September 13, 1995. NY 814362 covered an acrylic desk top case with a hinged lid. NY 814365 covered acrylic stands used to display items in museums or retail establishments. Both articles were classified under subheading 3926.90.98, HTSUS, as other articles of plastics.

Holding:

Plastic display cases and holders for baseballs and hockey pucks are classified in subheading 3926.90.98, HTSUS, which provides for: other articles of plastic, other.

Effect on Other Rulings:

HQ 955104 is modified, as set forth in this decision. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO CLASSIFICATION OF NOTCHED LUMBER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letters and treatment relating to the classification of notched lumber.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke four ruling letters pertaining to the tariff classification of notched lumber and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before April 5, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927–2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke four ruling letters pertaining to the tariff classification of notched lumber. Customs has undertaken reasonable efforts to search existing data bases for rulings, in addition to the four identified, on the same merchandise and consulted with the National Commodity Specialist Division, Office of Regulations and Rulings, in this respect. No further rulings have been found. This notice will, however, cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In New York Ruling Letters (NY) B82545, dated March 14, 1997, NY B85796, dated June 4, 1997, NY B89813, dated October 7, 1997, and NY C82044, dated December 11, 1997, wood studs cut to varying lengths and featuring one or two notches (also referred to as "cut outs"), were

classified in heading 4418, Harmonized Tariff Schedule of the United States (HTSUS), which provides for, among other things, builders' joinery and carpentry of wood. The determination in these rulings was premised on the fact that the stated purpose of the notches was to facilitate the installation of electrical wires, cables or pipes in a wall. These ruling letters are set forth in "Attachments A through D."

The revocation of a ruling letter addressing similar merchandise, referred to as "drilled lumber", was published in the CUSTOMS BULLETIN, Vol. 32, No. 26, on July 1, 1998. That revocation letter (Headquarters Ruling Letter (HQ) 961555) stated, in part, that "because the subject drilled softwood studs containing a hole which may act as a conduit for wires or pipes are not in the form of assembled goods and do not qualify as a recognizable unassembled piece, the subject articles do not serve a structural purpose within the meaning of the EN to heading 4418, HTSUS, as properly understood." This decision was upheld by the Court of International Trade in *American Bayridge, Corp. v. U.S.*, Court No. 98–08–02682, decided December 16, 1998.

Similarly, in the case of the subject notched studs featuring notches or cut outs, as these studs are not in the form of assembled goods, and do not qualify as recognizable unassembled pieces, the subject notched studs do not serve the "structural purpose" intended by the EN to heading 4418, HTSUS. Thus, the proper tariff classification for the subject notched studs is in heading 4407, HTSUS. Customs believes that this proposed action is consistent with the Court's decision in *American Bayridge* supra. The notched lumber discussed herein is to be distinguished from that notched lumber where the notching is placed on the face of the board in order to accommodate another piece of lumber, and when assembled together they produce another good. Such other merchandise is outside the scope of this proposal, but is currently under review.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY B82545, NY B85796, NY B89813, NY C82044, and any other Customs ruling that may exist which has not been specifically identified, to reflect the proper classification of the notched studs. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letters (HQ) 962469, 962470, 962471, and 962472 are set forth in "Attachments E through H" to this document.

Publication of this notice does not constitute a change in position or a change in practice under the provisions of 19 CFR 177.10(c). This also does not constitute a finding by the Customs Service that any treatment

or practice existed with respect to the merchandise covered by this notice.

Dated: January 25, 1999.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, March 14, 1997.

CLA–2–44:RR:NC:2:230 B82545
Category: Classification
Tariff No. 4418.90.4090

MR. BEN L. SIMS
NORMAN G. JENSEN, INC.
P.O. Box 3789
Blaine, WA 98231–3789

Re: The tariff classification of studs with a cutout for wiring from Canada.

DEAR MR. SIMS:

In your letter dated January 29, 1997, on behalf of Timber West Forest Ltd., you requested a tariff classification ruling.

The ruling was requested on a 2 x 6 lumber board with a cutout or notch. A 36 inch length sample was submitted. The sample is marked S-P-F stud and consists of a solid piece of wood with two eased edges. It has a 1¾ inch wide and ¾ inch deep cutout across one edge about 8 inches from the end. The cutout is made to accommodate wiring in the walls of a home. The studs will be imported in lengths of 86 to 90 inches.

The applicable tariff provision for the studs with wiring cutouts will be 4418.90.4090, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for other builders' joinery and carpentry of wood. The general rate of duty will be 4 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–466–5779.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, December 11, 1997.

CLA–2–44:RR:NC:2:230 C82044
Category: Classification
Tariff No. 4418.90.4090

MR. TOM WOESTENDIEK
TRANS AMERICAN CHB, INC.
2775 Broadway
Buffalo, NY 14227–1043

Re: The tariff classification of notched (having a crosscut dado) wall components from Canada.

DEAR MR. WOESTENDIEK:

In your letter dated November 17, 1997, on behalf of your client, Empire Wholesale Lumber Co., you requested a tariff classification ruling.

The ruling was requested on pre-drilled wall components and on notched wall components. The wall components consist of 2 x 4 and 2 x 6 studs made of solid spruce/pine/fir wood. The lengths vary from 84 to 120 inches. Each stud is further worked either by having a notch cutout (crosscut dado) on one of the narrow sides or by having a hole drilled through the center of the wide side. The notched studs have one or more dados ¾ to 1 inch deep and ¾ to 5½ inches wide cutout across the side 16 inches from either end of the stud. The studs are notched in the above described manner to allow the installation of electrical wires, cables or pipes through a wall.

The applicable tariff provision for the notched wall components will be 4418.90.4090, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for other builders' joinery and carpentry of wood. The general rate of duty will be 4 percent ad valorem. Effective January 1, 1998, the general rate of duty will be 3.6 percent ad valorem.

In the event it is determined that the imported goods are not being manufactured and imported exactly as described in this ruling, the ruling will not be applicable to those goods. You should also be aware that the facts described in the foregoing ruling may be subject to periodic verification by the Customs Service.

The U.S. Customs Service is in the process of reviewing the classification of drilled lumber. A notice was issued on October 27, 1997 in the Federal Register, Volume 62, No. 207, pages 55667–8, soliciting comments regarding the commercial uses of wood studs with drilled holes. Comments are being accepted until December 26, 1997. Pending the comment period and the review of the comments received, no further rulings will be issued by Customs with respect to drilled softwood lumber. You may wish to consider resubmission of your request for a ruling on the drilled wall components at a later date after the above review period.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National import Specialist Paul Garretto at 212–466–5779.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 7, 1997.
CLA–2–44:RR:NC:2:230 B89813
Category: Classification
Tariff No. 4418.90.4090

MR. JAMES F. MORGAN
F. W. MYERS & CO., INC.
2600 Cabover Drive, Suite A
Hanover, MD 21076

Re: The tariff classification of pre-machined wood wall components (notched studs) from Canada.

DEAR MR. MORGAN:

In your letter dated September 11, 1997, on behalf of your principal, Donohue Forest Products Inc., you requested a tariff classification ruling.

The ruling was requested on pre-machined wall components consisting of wood studs having a dado (notch) across one edge. The studs are dressed solid wood boards measuring 1½ inches by 5½ inches and cut to specific lengths ranging from 84 to 120 inches. A notch is machine cut into one narrow side of the board about 6 to 18 inches from one end. The notch or cutout is ¾ inch deep and 1-5/8 inches wide. The purpose of the notch is to allow installation of electrical wires, cables or pipes in a wall. A 10 inch long sample section conforming to the above description was submitted with the ruling request.

The applicable tariff provision for the notched studs will be 4418.90.4090, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for other builders' joinery and carpentry of wood. The general rate of duty will be 4 percent ad valorem.

In the event it is determined that the imported goods are not being manufactured and imported exactly as described in this ruling, the ruling will not be applicable to those goods. You should also be aware that the facts described in the foregoing ruling may be subject to periodic verification by the Customs Service.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–466–5779.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, June 4, 1997.
CLA–2–44:RR:NC:SP:230 B85796
Category: Classification
Tariff No. 4418.90.4090

MR. ROY CARROLL
PETER ANGUS FOREST PRODUCTS LIMITED
77 Janda Court, Suite 204
Etobicoke, Ontario M9W 6V2
CANADA

Re: The tariff classification of notched lumber from Canada.

DEAR MR. CARROLL:

In your letters dated April 14 and May 1, 1997, you requested a tariff classification ruling.

The items in question are solid, stud-grade S-P-F wooden boards into which one or two notches have been cut. The boards are intended for use in the construction of walls in

houses or mobile homes. They will be 1½ inches thick, 3½ or 5½ inches wide, and between 81 and 120 inches long (depending on the height of the wall where used). One version will have a single notch, ¾ inch deep and 1½ inches wide, on one edge of the board about 12 inches from one end. A second version will have an additional notch on the opposite edge, about 12 inches from the other end. The purpose of the notches is to enable the builder to recess electrical wiring and then cover (the wiring) with a metal plate.

The applicable subheading for the notched studs will be 4418.90.4090, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) builders' joinery and carpentry of wood. The general rate of duty will be 4%.

With regard to your concern about the U.S./Canadian Softwood Lumber Agreement of 1996, please be advised that articles classifiable under subheading 4418.90.4090, HTS, are not currently subject to the special entry requirements based on said Agreement.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–466–5779.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 962469 jb
Category: Classification
Tariff No. 4407.10.0015

MR. BEN L. SIMS
NORMAN G. JENSEN, INC.
P.O. Box 3789
Blaine, WA 98231–3789

Re: Classification of notched studs; heading 4407.

DEAR MR. SIMS:

On March 14, 1997, our New York office issued to you New York Ruling Letter (NY) B82545, which addressed a 2 x 6 lumber board with a cut out or notch. This letter is to inform you that after review of that ruling, it has been determined that the classification of that merchandise in heading 4418, Harmonized Tariff Schedule of the United States (HTSUS) is incorrect. As such, NY B82545 is revoked pursuant to the analysis which follows below.

Facts:

The subject merchandise consists of a solid spruce/pine/fir stud with two eased edges. The stud features a 1¾ inch wide and ¾ inch deep cut out across one edge about eight inches from the end. It was stated that the cut out is made to accommodate wiring in the walls of a home. As such, the subject merchandise was classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be clas-

sified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Chapter 44, HTSUS, provides for, among other things, wood and articles of wood. This chapter is structured so that less processed wood appears at the beginning of the chapter followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4403, HTSUS, is a general provision for wood in the rough, whether or not stripped of bark or sapwood or roughly squared, and heading 4421, HTSUS, is a basket provision for more advanced articles of wood that cannot be classified elsewhere in the chapter.

As heading 4407 resides at the beginning of Chapter 44, HTSUS, it reflects coverage of a relatively basic category of lumber products in relation to heading 4418, which, residing closer to the end of Chapter 44, HTSUS, reflects coverage of a relatively more advanced category of products. Heading 4407, HTSUS, provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm. Customs believes that, while not dispositive, the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) should always be consulted when resolving a particular classification question. *See*, 54 Fed.Reg. 35127 (August 23, 1989). In this regard, the EN to heading 4407, HTSUS, state in relevant part:

> The products of this heading may be planed (whether or not the angle formed by two adjacent sides is slightly rounded during the planing process), sanded, or end-jointed, e.g. finger-jointed (see the General Explanatory Note to this Chapter).

Heading 4418, provides for, among other things, builder's joinery and carpentry of wood. The EN to heading 4418, HTSUS, state in pertinent part:

> This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.
>
> The term **"joinery"** applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term **"carpentry"** refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete constructional work. * * *

The agency's position is that the subject merchandise, but for the notching, falls within heading 4407, HTSUS. The tariff issue to be resolved, therefore, is whether the notching of theses studs should cause these articles to be considered as one of the relatively advanced articles provided for under heading 4418, HTSUS, that is, "builders' joinery and carpentry of wood." Upon further analysis of the competing tariff provisions, we do not believe the minimal addition of notches to these articles is sufficient to change their classification.

At the time NY B82545 was issued, it was generally understood that the notched studs were to be used for structural purposes, that is, for framing houses, and, consequently, the articles appeared to fall within the language of the EN to heading 4418, HTSUS. However, for the reasons that follow, we believe the conclusion, that this understanding causes the articles to fall under heading 4418, HTSUS, was in error. First, this understanding of the structural purpose of these articles exists whether or not the articles are notched and, as stated above, notwithstanding the unnotched articles are generally understood to be used for the structural purpose of framing houses, they fall under heading 4407, HTSUS. Second, a close reading of the EN to heading 4418, HTSUS, suggests that the first and second paragraphs are to be read in relation to one another. In that respect, the language regarding the term "carpentry" appearing in the EN to heading 4418, should be read in the context of the paragraph immediately preceding it so that heading 4418 applies only to woodwork used for structural purposes which is in the form of assembled goods or as recognizable unassembled pieces. In other words, the article must be in the form of an assembled good or exhibit some feature (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly) which qualifies it as a recognizable unassembled piece. It follows that, because the subject notched studs containing a notch or cut out may act as a conduit for wires or pipes are not in the form of assembled goods and do not qualify as recognizable unassembled pieces, the subject articles do not serve a structural purpose within the meaning of the EN to heading 4418, HTSUS, as properly understood.

Holding:

NY B82545 is revoked to reflect the proper classification of the subject notched studs in heading 4407, HTSUS.

The subject notched studs are properly classifiable in subheading 4407.10.0015, HTSUS, which provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm: coniferous: other: not treated: mixtures of spruce, pine and fir ("S-P-F"). The applicable rate of general duty is "Free".

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 962470 jb
Category: Classification
Tariff No. 4407.10.0015

MR. TOM WOESTENDIEK
TRANS AMERICAN CHB, INC.
2775 Broadway
Buffalo, NY 14227–1043

Re: Classification of notched studs; heading 4407.

DEAR MR. WOESTENDIEK:

On December 11, 1997, our New York office issued to you New York Ruling Letter (NY) C82044, which addressed certain pre-drilled and notched wall components. This letter is to inform you that after review of that ruling, it has been determined that the classification of that merchandise in heading 4418, Harmonized Tariff Schedule of the United States (HTSUS) is incorrect. As such, NY C82044 is revoked pursuant to the analysis which follows below.

Facts:

The subject merchandise consists of wall components consisting of studs measuring 2 x 4 and 2 x 6, made of solid spruce/pine/fir wood. The lengths vary from 84 to 120 inches. Each stud is further worked either by having a notch cut out (crosscut dado) on one of the narrow sides or by having a hole drilled through the center of the wide side. The notched studs feature one or more dados ¾ to 1 inch deep and ¾ to 5½ inches wide cut outs across the side, 16 inches from either end of the stud. It was stated that the purpose of the notches is to allow installation of electrical wires, cables, or pipes in a wall. As such, the subject merchandise was classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Chapter 44, HTSUS, provides for, among other things, wood and articles of wood. This chapter is structured so that less processed wood appears at the beginning of the chapter

followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4403, HTSUS, is a general provision for wood in the rough, whether or not stripped of bark or sapwood or roughly squared, and heading 4421, HTSUS, is a basket provision for more advanced articles of wood that cannot be classified elsewhere in the chapter.

As heading 4407 resides at the beginning of Chapter 44, HTSUS, it reflects coverage of a relatively basic category of lumber products in relation to heading 4418, which, residing closer to the end of Chapter 44, HTSUS, reflects coverage of a relatively more advanced category of products. Heading 4407, HTSUS, provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm. Customs believes that, while not dispositive, the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) should always be consulted when resolving a particular classification question. *See*, 54 Fed.Reg. 35127 (August 23, 1989). In this regard, the EN to heading 4407, HTSUS, state in relevant part:

> The products of this heading may be planed (whether or not the angle formed by two adjacent sides is slightly rounded during the planing process), sanded, or end-jointed, e.g. finger-jointed (see the General Explanatory Note to this Chapter).

Heading 4418, provides for, among other things, builder's joinery and carpentry of wood. The EN to heading 4418, HTSUS, state in pertinent part:

> This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.
>
> The term **"joinery"** applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term **"carpentry"** refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete constructional work. * * *

The agency's position is that the subject merchandise, but for the notching, falls within heading 4407, HTSUS. The tariff issue to be resolved, therefore, is whether the notching of theses studs should cause these articles to be considered as one of the relatively advanced articles provided for under heading 4418, HTSUS, that is, "builders' joinery and carpentry of wood." Upon further analysis of the competing tariff provisions, we do not believe the minimal addition of notches to these articles is sufficient to change their classification.

At the time NY C82044 was issued, it was generally understood that the drilled and notched studs were to be used for structural purposes, that is, for framing houses, and, consequently, the articles appeared to fall within the language of the EN to heading 4418, HTSUS. However, for the reasons that follow, we believe the conclusion, that this understanding causes the articles to fall under heading 4418, HTSUS, was in error. First, this understanding of the structural purpose of these articles exists whether or not the articles are drilled/notched and, as stated above, notwithstanding the undrilled/unnotched articles are generally understood to be used for the structural purpose of framing houses, they fall under heading 4407, HTSUS. Second, a close reading of the EN to heading 4418, HTSUS, suggests that the first and second paragraphs are to be read in relation to one another. In that respect, the language regarding the term "carpentry" appearing in the EN to heading 4418, should be read in the context of the paragraph immediately preceding it so that heading 4418 applies only to woodwork used for structural purposes which is in the form of assembled goods or as recognizable unassembled pieces. In other words, the article must be in the form of an assembled good or exhibit some feature (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly) which qualifies it as a recognizable unassembled piece. It follows that, because the subject drilled/notched studs containing a hole, notch or cut out may act as a conduit for wires or pipes are not in the form of assembled goods and do not qualify as recognizable unassembled pieces, the subject articles do not serve a structural purpose within the meaning of the EN to heading 4418, HTSUS, as properly understood.

Holding:

NY C82044 is revoked to reflect the proper classification of the subject notched studs in heading 4407, HTSUS.

The subject notched studs are properly classifiable in subheading 4407.10.0015, HTSUS, which provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not

planed, sanded or finger-jointed, of a thickness exceeding 6mm: coniferous: other: not treated: mixtures of spruce, pine and fir ("S-P-F"). The applicable rate of general duty is "Free".

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:TE 962471 jb
Category: Classification
Tariff No. 4407.10.0015

MR. JAMES F. MORGAN
F.W. MYERS & CO., INC.
2600 Cabover Drive, Suite A
Hanover, MD 21076

Re: Classification of notched studs; heading 4407.

DEAR MR. MORGAN:

On October 7, 1997, our New York office issued to you New York Ruling Letter (NY) B89813, which addressed certain pre-machined wall components consisting of wood studs having a dado (notch) across one edge. This letter is to inform you that after review of that ruling, it has been determined that the classification of that merchandise in heading 4418, Harmonized Tariff Schedule of the United States (HTSUS) is incorrect. As such, NY B89813 is revoked pursuant to the analysis which follows below.

Facts:

The subject merchandise consists of dressed solid wood boards measuring 1½ inches by 5½ inches and cut to specific lengths ranging from 84 to 120 inches. A notch is machine cut into one narrow side of the board about 6 to 18 inches from one end. The notch or cut out is ¾ inch deep and 1-5/8 inches wide. It was stated that the purpose of the notches is to allow installation of electrical wires, cables, or pipes in a wall. As such, the subject merchandise was classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Chapter 44, HTSUS, provides for, among other things, wood and articles of wood. This chapter is structured so that less processed wood appears at the beginning of the chapter followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4403, HTSUS, is a general provision for wood in the rough, whether or not stripped of bark or sapwood or roughly squared, and heading 4421, HTSUS, is a basket provision for more advanced articles of wood that cannot be classified elsewhere in the chapter.

As heading 4407 resides at the beginning of Chapter 44, HTSUS, it reflects coverage of a relatively basic category of lumber products in relation to heading 4418, which, residing closer to the end of Chapter 44, HTSUS, reflects coverage of a relatively more advanced category of products. Heading 4407, HTSUS, provides for wood sawn or chipped length-

wise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm. Customs believes that, while not dispositive, the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) should always be consulted when resolving a particular classification question. *See*, 54 Fed.Reg. 35127 (August 23, 1989). In this regard, the EN to heading 4407, HTSUS, state in relevant part:

> The products of this heading may be planed (whether or not the angle formed by two adjacent sides is slightly rounded during the planing process), sanded, or end-jointed, e.g. finger-jointed (see the General Explanatory Note to this Chapter).

Heading 4418, provides for, among other things, builder's joinery and carpentry of wood. The EN to heading 4418, HTSUS, state in pertinent part:

> This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.
>
> The term **"joinery"** applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term **"carpentry"** refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete constructional work. * * *

The agency's position is that the subject merchandise, but for the notching, falls within heading 4407, HTSUS. The tariff issue to be resolved, therefore, is whether the notching of theses studs should cause these articles to be considered as one of the relatively advanced articles provided for under heading 4418, HTSUS, that is, "builders' joinery and carpentry of wood." Upon further analysis of the competing tariff provisions, we do not believe the minimal addition of notches to these articles is sufficient to change their classification.

At the time NY B89813 was issued, it was generally understood that the notched studs were to be used for structural purposes, that is, for framing houses, and, consequently, the articles appeared to fall within the language of the EN to heading 4418, HTSUS. However, for the reasons that follow, we believe the conclusion, that this understanding causes the articles to fall under heading 4418, HTSUS, was in error. First, this understanding of the structural purpose of these articles exists whether or not the articles are notched and, as stated above, notwithstanding the unnotched articles are generally understood to be used for the structural purpose of framing houses, they fall under heading 4407, HTSUS. Second, a close reading of the EN to heading 4418, HTSUS, suggests that the first and second paragraphs are to be read in relation to one another. In that respect, the language regarding the term "carpentry" appearing in the EN to heading 4418, should be read in the context of the paragraph immediately preceding it so that heading 4418 applies only to woodwork used for structural purposes which is in the form of assembled goods or as recognizable unassembled pieces. In other words, the article must be in the form of an assembled good or exhibit some feature (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly) which qualifies it as a recognizable unassembled piece. It follows that, because the subject notched studs containing a notch or cut out may act as a conduit for wires or pipes are not in the form of assembled goods and do not qualify as recognizable unassembled pieces, the subject articles do not serve a structural purpose within the meaning of the EN to heading 4418, HTSUS, as properly understood.

Holding:

NY B89813 is revoked to reflect the proper classification of the subject notched studs in heading 4407, HTSUS.

The subject notched studs are properly classifiable in subheading 4407.10.0015, HTSUS, which provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm: coniferous: other: not treated: mixtures of spruce, pine and fir ("S-P-F"). The applicable rate of general duty is "Free".

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 962472 jb
Category: Classification
Tariff No. 4407.10.0015

MR. ROY CARROLL
PETER ANGUS FOREST PRODUCTS LIMITED
77 Janda Court, Suite 204
Etobicoke, Ontario M9W 6V2

Re: Classification of notched studs; heading 4407.

DEAR MR. CARROLL:

On June 4, 1997, our New York office issued to you New York Ruling Letter (NY) B85796, which addressed certain solid, stud-grade spruce/pine/fir wooden boards into which notches have been cut. This letter is to inform you that after review of that ruling, it has been determined that the classification of that merchandise in heading 4418, Harmonized Tariff Schedule of the United States (HTSUS) is incorrect. As such, NY B85796 is revoked pursuant to the analysis which follows below.

Facts:

The subject merchandise consists of boards which are 1½ inches thick, 3½ inches or 5½ inches wide, and between 81 and 120 inches long (depending on the height of the wall used). The boards are intended for use in the construction of walls in houses or mobile homes. One version was stated to have a single notch, ¾ inch deep and 1½ inches wide on one edge of the board about 12 inches from one end. A second version will have an additional notch on the opposite edge, about 12 inches from the other end. It was stated that the purpose of the notches is to enable the builder to recess electrical wiring. As such, the subject merchandise was classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Chapter 44, HTSUS, provides for, among other things, wood and articles of wood. This chapter is structured so that less processed wood appears at the beginning of the chapter followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4403, HTSUS, is a general provision for wood in the rough, whether or not stripped of bark or sapwood or roughly squared, and heading 4421, HTSUS, is a basket provision for more advanced articles of wood that cannot be classified elsewhere in the chapter.

As heading 4407 resides at the beginning of Chapter 44, HTSUS, it reflects coverage of a relatively basic category of lumber products in relation to heading 4418, which, residing closer to the end of Chapter 44, HTSUS, reflects coverage of a relatively more advanced category of products. Heading 4407, HTSUS, provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm. Customs believes that, while not dispositive, the Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) should always be consulted when resolving a particular classification question. *See*, 54 Fed.Reg. 35127 (August 23, 1989). In this regard, the EN to heading 4407, HTSUS, state in relevant part:

> The products of this heading may be planed (whether or not the angle formed by two adjacent sides is slightly rounded during the planing process), sanded, or end-jointed, e.g. finger-jointed (see the General Explanatory Note to this Chapter).

Heading 4418, provides for, among other things, builder's joinery and carpentry of wood. The EN to heading 4418, HTSUS, state in pertinent part:

> This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.
>
> The term **"joinery"** applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term **"carpentry"** refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete constructional work. * * *

The agency's position is that the subject merchandise, but for the notching, falls within heading 4407, HTSUS. The tariff issue to be resolved, therefore, is whether the notching of theses studs should cause these articles to be considered as one of the relatively advanced articles provided for under heading 4418, HTSUS, that is, "builders' joinery and carpentry of wood." Upon further analysis of the competing tariff provisions, we do not believe the minimal addition of notches to these articles is sufficient to change their classification.

At the time NY B85796 was issued, it was generally understood that the notched studs were to be used for structural purposes, that is, for framing houses, and, consequently, the articles appeared to fall within the language of the EN to heading 4418, HTSUS. However, for the reasons that follow, we believe the conclusion, that this understanding causes the articles to fall under heading 4418, HTSUS, was in error. First, this understanding of the structural purpose of these articles exists whether or not the articles are notched and, as stated above, notwithstanding the unnotched articles are generally understood to be used for the structural purpose of framing houses, they fall under heading 4407, HTSUS. Second, a close reading of the EN to heading 4418, HTSUS, suggests that the first and second paragraphs are to be read in relation to one another. In that respect, the language regarding the term "carpentry" appearing in the EN to heading 4418, should be read in the context of the paragraph immediately preceding it so that heading 4418 applies only to woodwork used for structural purposes which is in the form of assembled goods or as recognizable unassembled pieces. In other words, the article must be in the form of an assembled good or exhibit some feature (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly) which qualifies it as a recognizable unassembled piece. It follows that, because the subject notched studs containing a notch or cut out may act as a conduit for wires or pipes are not in the form of assembled goods and do not qualify as recognizable unassembled pieces, the subject articles do not serve a structural purpose within the meaning of the EN to heading 4418, HTSUS, as properly understood.

Holding:

NY B885796 is revoked to reflect the proper classification of the subject notched studs in heading 4407, HTSUS.

The subject notched studs are properly classifiable in subheading 4407.10.0015, HTSUS, which provides for wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm: coniferous: other: not treated: mixtures of spruce, pine and fir ("S-P-F"). The applicable rate of general duty is "Free".

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 99–1)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CARMARGO CORREA METAIS, S.A. AND COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS, DEFENDANT-INTERVENORS

Court No. 97–02–00268

(Dated January 5, 1999)

JUDGMENT

MUSGRAVE, *Judge:* Upon finding that the United States Department of Commerce, International Trade Administration's ("Commerce") *Silicon Metal from Brazil; Amended Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 54,094 (October 17, 1997)(*"Amended Final Results"*) correct all outstanding errors alleged by plaintiffs and upon due consideration of all other papers and proceedings had herein, it is hereby:

ORDERED that the *Amended Final Results* are affirmed in all respects; and it is further

ORDERED that all other issues having been decided, this case is dismissed.

(Slip Op. 99–2)

TIMEX VI., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 96–02–00528

(Dated January 6, 1999)

ORDER

DICARLO, *Senior Judge:* In conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit, it is hereby

ORDERED that this action is remanded to the United States Department of Commerce, International Trade Administration for further proceedings in conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit; and it is further

ORDERED that Commerce shall file its remand results with the court within 45 days of the date of this order; and it is further

ORDERED that any party contesting the remand results shall file comments with the court within 30 days of the remand results.

(Slip Op. 99–3)

SAMSUNG ELECTRONICS AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–04–00288

[Plaintiff's motion for partial summary judgment is denied. Defendant's cross-motion for summary judgment is granted. Judgment entered for defendant.]

(Dated January 6, 1999)

Irving A. Mandel; *Thomas J. Kovarcik* and *Jeffrey H. Pfeffer*, of counsel, for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Bruce N. Stratvert*, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mark G. Nackman)*, of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* This case comes before the Court on cross-motions for summary judgment following a decision by the United States Court of Appeals for the Federal Circuit, reversing and remanding this Court's opinion in *Samsung Electronics America, Inc. v. United States*, 19 CIT 1307, 904 F.Supp. 1403 (1996) *("Samsung I"). See Samsung Elecs. Am., Inc. v. United States*, ____ Fed. Cir. (T) ____, 106 F.3d 376 (1997) *("Sam-*

sung II"). Plaintiff Samsung Electronics America Inc. ("Samsung") challenges defendant the United States Customs Service's ("Customs") refusal to grant an allowance in the appraised value of imported electronic equipment under 19 C.F.R. § 158.12. Specifically, Samsung asserts that because the merchandise contained latent defects at the time of importation, Customs should have granted Samsung an allowance in value and refund of duties pursuant to section 158.12. Samsung claims an allowance in value of $1,938,451, the alleged difference between the appraised value at the time of importation and Samsung's own post-importation appraisal of the defective merchandise.

Because the Court concludes that Samsung cannot establish either the existence of latent defects in the subject entries with any specificity or the value of such claimed defects, it grants summary judgment in favor of defendant. The Court exercises jurisdiction in this matter under 28 U.S.C. § 1581(a) (1994).

I.

BACKGROUND

Plaintiff, among other business ventures, imports substantial quantities of electronic goods manufactured by its foreign parent company, Samsung Electronics Company, Ltd. ("SEC"). This case involves merchandise Samsung entered between 1987 and 1990. The merchandise at issue is an array of electronic equipment, including televisions, stereos, video cassette recorders, and microwave ovens. According to Samsung, the subject merchandise "comprise[s] virtually all of the merchandise that [Samsung] imported for the period December 1987 to October 1990." Pl.'s Statement of Undisputed Facts Pursuant to USCIT R. 56.1, dated April 14, 1993 ("Pl.'s Undisputed Facts I"), at ¶ 2. Upon entry, Customs appraised the subject merchandise based on transaction value pursuant to 19 U.S.C. § 1401a (1988). *See Samsung I*, 19 CIT at 1308, 904 F. Supp. at 1404. After importation, Samsung sold the merchandise to customers throughout the United States. And periodically, customers would return the subject merchandise to Samsung, claiming the goods were defective.

On these general facts, Samsung filed a claim with Customs seeking an allowance for latent defects, and concomitant refund of duties, pursuant to 19 C.F.R. § 158.12. The cornerstone of its allowance claim is the fact that Samsung sold all the subject merchandise with a consumer warranty that specifically covered latent defects. Under the warranty, when Samsung confirmed that returned merchandise contained a latent defect, the company repaired or replaced the goods at no charge to the customer. Samsung's warranty was effective for a period ranging from ninety days to one year from the date of sale to the customer, and longer warranties were provided for isolated components of the merchandise. *See* Pl.'s Undisputed Facts I, at ¶¶ 14–15.

Typically, Samsung processed the defective merchandise claims through two channels: (1) it sold the defective merchandise "as is" to outside "jobbers" at a discount, who then repaired the merchandise, re-

moved the Samsung labels, and resold the merchandise for their own accounts; or (2) Samsung either performed in-house repairs or contracted with unrelated service centers to repair defective merchandise, and then returned the repaired goods to the customers. *See* Pl.'s Undisputed Facts I, at ¶ 22; Pl.'s Statement of Undisputed Material Facts Pursuant to USCIT R. 56(i), dated May 26, 1997 ("Pl.'s Undisputed Facts II"), at ¶ 9. Importantly, the consumer warranty at issue excluded coverage for all damage caused by mishandling or consumer misuse. *See* Pl.'s Undisputed Facts II, at ¶ 3; Pl.'s Br. in Supp. of Mot. for Summ. J. ("Pl.'s Br."), at Ex. 1.

Samsung and SEC also entered service agreements related to the subject merchandise, whereby SEC reimbursed Samsung for costs associated with defective merchandise purchased from SEC. Under the service agreements, SEC limited potential reimbursement to an amount equal to five percent of SEC's annual sales to Samsung. For the years in question, SEC reimbursed Samsung for an amount equal, on average, to 4.7% of total annual sales of subject merchandise. *See Samsung II*, ___ Fed. Cir. (T) ___, 106 F.3d at 378 (1997).

For purposes of this case, Samsung derived an allowance figure from three separate accounting records that track warranty costs and losses: (1) a combined record of total in-house repair costs and costs paid to unrelated service centers to repair merchandise; (2) a record of the cost of replacement goods; and (3) a record of the discount prices at which defective goods were sold. From this data, Samsung calculated its total warranty costs and losses for the year.[1] Samsung then used the total warranty costs and losses figure to calculate the "Defective Merchandise Factor" ("DMF"), derived "by dividing the total warranty costs and losses per year by the total FOB value of merchandise for that year." Pl.'s Undisputed Facts II, at ¶ 17. Samsung claims that the DMF is an accurate measure of the value allowance it should receive from Customs on the protested entries. It asserts that the average DMF for the years 1987 through 1990 is 6.37%, and using that DMF, it should be awarded an allowance, and concomitant refund of duties, in the amount of $ 1,938,451. *See* Pl.'s Undisputed Facts II, at ¶ 21.

On prior cross-motions for summary judgment, this Court ruled that Samsung was not due a section 158.12 allowance. The Court held that when Samsung purchased the subject merchandise from SEC, it contracted for merchandise that contained latent defects and, hence, no allowance from transaction value was appropriate.[2] *See Samsung I*, 19 CIT at 1309, 904 F. Supp. at 1405. The Federal Circuit reversed this decision, concluding that Samsung had ordered defect-free goods and therefore could maintain an allowance claim for latent defects. *See Samsung*

[1] To compute its losses on discounted sales, Samsung subtracted the discounted resale prices and any applicable refurbishing costs from the original sale prices for defect-free merchandise.

[2] The Court also rejected Samsung's claim that the repairs to the merchandise constituted post-importation maintenance costs and, hence, should be deducted from the appraised value of the goods pursuant to 19 U.S.C. § 1401a(b)(3)(A)(i) (1988). *See* 19 CIT at 1310–11, 904 F. Supp. at 1405–06. Although Samsung also appealed this aspect of *Samsung I*, the Federal Circuit declined to address the argument on appeal. *See* ___ Fed. Cir. (T) at ___, 106 F.3d at 378 n.1.

II, ___ Fed. Cir. (T) at ___, 106 F.3d at 379. The Federal Circuit, however, did not reach the question of whether particular entries actually contained defective merchandise and, if so, what the appropriate allowance should be for the defects. Instead, the Federal Circuit remanded the case for this Court to ascertain whether "defects [were] in existence at the time of importation," *id.* at ___, 106 F.3d at 380 n.4, and "for a determination of the 'allowance [to be] made in value to the extent of the damage.'" *Id.* at ___, 106 F.3d at 380 (quoting 19 C.F.R. § 158.12).

On remand, Samsung filed a partial summary judgment motion, requesting that the Court endorse the average DMF of 6.37% as the appropriate measure of allowance. Customs' filed a cross-motion for summary judgment, contending that, notwithstanding *Samsung II*, plaintiff is still not entitled to an allowance in value because (1) Samsung's evidence fails to demonstrate that subject entries actually contained latent defects at the time of importation; and (2) the evidence fails to establish the extent to which any defects that may have been present decreased the value of the merchandise.

II.

Standard of Review

This test case is before the Court on cross-motions for summary judgment. The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment, however, is not appropriate when a party presents "a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (citation omitted). And, a party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions to file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Caterett*, 477 U.S. 317, 324 (1986) (citing Fed. R. Civ. P. 56(e)).

While it is true that Customs' appraisal decisions are entitled to a statutory presumption of correctness, *see* 28 U.S.C. § 2639(a)(1), when a question of law is before the Court, the statutory presumption of correctness does not apply. *See, e.g., Universal Elecs., Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 112 F.3d 488, 492 (1997). There are no genuine issues of material fact at issue in this case nor are there factual elements of Customs' decision at issue and, hence, the statutory presumption of correctness is inapplicable. Thus, the Court must consider whether Customs' underlying appraisal decision here is correct as a matter of law.

III.

DISCUSSION

Under 19 C.F.R. § 158.12, a protestant qualifies for an allowance in dutiable value where (1) imported goods are determined to be partially damaged at the time of importation, and (2) the allowance sought is commensurate to the diminution in the value of the merchandise caused by the defect. Specifically, section 158.12 provides as follows:

> Merchandise partially damaged at time of importation. (A) *Allowance in value.* Merchandise which is subject to ad valorem or compound duties and found by the district director to be partially damaged *at the time of importation* shall be appraised in its condition as imported, *with an allowance made in the value to the extent of the damage.*

19 C.F.R. § 158.12 (emphasis added).

To qualify for an allowance, a protestant must also satisfy *both* elements of the above provision by clear and convincing evidence. The clear and convincing standard is not provided for in 19 C.F.R. § 158.12. Rather, Customs has interpreted the regulation as requiring clear and convincing evidence. *See* C.S.D. 84–11, 18 Cust. B. & Dec. 849, 852 (1984) (requiring that "the importer must provide the concerned Customs officer with clear and convincing evidence to support a claim that merchandise purchased and appraised as one quality was in fact of a lesser quality, thus warranting an allowance in duties); *see also* HQ 546354 (July 19, 1996); HQ 544986 (Feb. 28, 1994); HQ 545231 (Nov. 5, 1993). The Federal Circuit also endorsed this evidentiary standard in *Samsung II*. *See* ___ Fed. Cir. (T) at _____, 106 F.3d at 378 (deferring to Customs' interpretation of section 158.12). Because the Court gives deference to Customs' interpretation of the evidentiary standard corresponding to section 158.12, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court reviews whether Samsung's proffered evidence satisfies both elements of the allowance provision by clear and convincing evidence.

As the Federal Circuit cautioned in its remand instructions, the amount of the allowance is limited to "those defects in existence *at the time of importation*, and not for instance, those caused by [Samsung's] own mishandling or by consumer misuse of the equipment." *Samsung II*, ___ Fed.Cir.(T) at ____, 106 F.3d at 380 (emphasis added). After reviewing the evidence, the Court grants Customs' motion for summary judgment.

It is uncontested that some of the merchandise Samsung entered between 1987 and 1990 contained latent defects. That is, simply by virtue of the fact that all merchandise entered between 1987 and 1990 was covered by the warranty and that claims were made on this warranty between 1987 and 1990, it follows that some of the merchandise contained in the subject entries was defective. Yet, Samsung's evidence fails to establish with any specificity which of the subject entries contained merchandise with latent defects at the time of importation.

More importantly, even if Samsung were able to identify those entries that contained defective merchandise at the time of importation, its claim still fails because it offers no measure of precision upon which an appropriate allowance in value can be derived. That is, Samsung simply offers no evidence to suggest that it can link diminution in the value of specific merchandise to specific entries. Without some evidence that the allowance claimed actually relates to the specific entries at issue, a section 158.12 claim is lost. Consequently, Samsung's motion for partial summary judgment must fail, and defendant's cross-motion for summary judgment prevails.

A. *Samsung Fails to Establish by Clear and Convincing Evidence Which Entries Had Latent Defects at the Time of Importation.*

In lieu of specific descriptions or samples to illustrate damage at the time of importation, Samsung presents the consumer warranty for the subject merchandise as its principle evidence that entries contained defective merchandise at the time of importation. In relevant part, the warranty at issue states the "Samsung product is warranted by [Samsung] against manufacturing defects in materials or workmanship." Pl.'s Br., at Ex. 1. Samsung also offers an internal document to show that it rejected warranty repair on certain returned merchandise and, therefore, asserts this is proof that the company only repaired latent defects under the relevant warranty. Pl.'s Br., at Ex. 3.

The Court is unpersuaded that Samsung's evidence establishes by clear and convincing evidence which subject entries had latent defects at the time of importation, as required by section 158.12. As noted earlier, it is uncontested that at least some of the merchandise contained latent defects. The consumer warranty, and the corresponding claim records, indeed amount to conclusive proof of this fact. Yet, the warranty, and the claim records, fail to demonstrate with any particularity the precise entries that contained defects. Because the warranty covers *all* merchandise contained in all subject entries, it is impossible to accept the warranty, standing alone, as evidence of which particular entries had defects. And Samsung does not contend that *all* entries contained defective merchandise at the time of importation. Therefore, while establishing that *some* merchandise was defective, the warranty, in and of itself, does not establish *which* particular entries contained defective merchandise.

Moreover, the warranty indicates that the defects were not detected in the subject merchandise until customers made returns under warranty, quite some time after importation. Evidence provided in reappraisal cases, such as a 19 C.F.R. § 158.12 claim, is of greater weight when gathered contemporaneous with importation, and less so when time has passed between importation and protest. *See Parmentier's Roses v. United States*, 39 Cust. Ct. 170, 173, 1957 WL 9559, at *3 (Cust. Ct. 1957) (noting that remoteness in time goes to the weight of evidence presented in reappraisal cases). The logic underpinning this rule is clear. Once Customs has liquidated merchandise, it can be damaged through a

number of causes, including misuse or mishandling. This makes it difficult, or in some cases impossible, to identify the root cause of the damage or defect. Consequently, the more remote that an inspection is to the time of importation, the less persuasive that inspection is as evidence of the condition of the merchandise at the time of importation.

Here, the defects were only discovered when a customer submitted a warranty claim. Given the term of the warranty, this might be anywhere from ninety days to one year after the merchandise was sold to the customer. It is true that Samsung's warranty only covers repairs for defective merchandise, not merchandise damaged through misuse or mishandling. *See* Pl.'s Br., at Ex. 1. A Samsung executive also has stated that under the warranty, only merchandise with latent defects was repaired or replaced. *See* Pl.'s Br., Affidavit of Kang Bae Park, Samsung Tax and Accounting Manager, at ¶¶ 4–8. Although the Court has no reason to doubt the veracity of Samsung's assertions, without additional, independent evidence to corroborate the assertions, the Court cannot verify that the merchandise was actually defective at the time of importation, as opposed to damaged later through misuse or mishandling.

A warranty surely may be used as supplementary evidence that a defect existed at the time of importation. Yet, to prevail on a section 158.12 claim, more objective and verifiable evidence with some semblance of specificity must also be proffered. Indeed, to make a section 158.12 claim, a claimant should provide specific descriptions of the damage or defect alleged and, in some manner, relate that defective merchandise to a particular entry. Such descriptions are necessary because both the Court and Customs must independently confirm the validity of an allowance claim. And, descriptions or samples provide a reasonably objective basis upon which to assess such a claim. For example, descriptions can be reviewed by the Court and by independent experts to confirm that the alleged damage existed at the time of importation, or that the damage is recognizable as a true manufacturing defect. An undocumented assertion that damage existed, such as a warranty, cannot amount to clear and convincing evidence that defects existed at the time of importation. *See Esformes Packing Corp. v. United States*, 61 Cust. Ct. 355, 1968 WL 11584, at *2 (Cust. Ct. 1968) (denying protests because it was impossible to deduce from the record evidence the existence of damage at the time of importation); *see also* HQ 546354 (July 19, 1996) (denying protests because alleged defects in imported yarn and alkathene powder, respectively, were undetected in samples submitted to Customs, and claimants failed to submit any other independent testing).

For these reasons, the Court concludes that while it is uncontested that some of the subject entries had latent defects at the time of importation, Samsung fails to identify those particular entries that had latent defects at the time of importation. Accordingly, the Court grants defendant's summary judgment motion on this issue.

B. *Samsung Fails to Show by Clear and Convincing Evidence That an Appropriate Allowance in Value Can be Calculated for the Alleged Defects in the Subject Entries.*

Even assuming *arguendo* that Samsung has proved by clear and convincing evidence that defects existed in all entries at the time of importation, its section 158.12 claim still fails because Samsung cannot demonstrate with any precision what the claimed allowance in value should be for the defective merchandise. Here, Samsung argues that its total warranty cost and loss data provide an accurate measure from which an appropriate allowance for defective merchandise can be derived. The Court concludes that it does not.

As evidence of the post-importation appraised value of the subject merchandise, Samsung offers its total warranty costs and losses for the year. This data, however, fails to illuminate the extent of damage to merchandise contained in subject entries for a number of reasons. Samsung's repair records are not detailed enough to ascertain whether the costs incurred actually relate to the subject entries. Most importantly, it is not apparent from Samsung's records that repair costs for the subject merchandise are segregated from repair costs for merchandise contained in other, non-subject entries. That is, the total warranty cost and loss figure does not appear to segregate the costs and losses related to the subject merchandise from the costs and losses associated with other Samsung merchandise, whether by model or by year of sale. For example, Samsung claims that its total warranty costs associated with 1987 claims is $4,243,033.16. *See* Pl.'s Br., at Ex. 4. Yet, Samsung claims an allowance on entries made between *December 1987* and October 1990. *See* Pl.'s Undisputed Facts I, at ¶ 2. Samsung has not made it clear what portion, if any, of the warranty costs for the whole of 1987 corresponds to the entries made in December 1987.

Moreover, Samsung includes warranty costs for the years 1987 to 1990 in its DMF factor calculation. As Samsung itself acknowledges, the warranty typically lasts for between ninety days to one year after the date of sale. *See* Pl.'s Undisputed Facts I, at ¶¶ 14–15. It is theoretically possible, though not likely, that all of the subject merchandise was sold out of inventory by the end of 1990. Yet, the Court cannot envision how warranty claims for this same merchandise could also have been made before the close of 1990, in which case the warranty costs and losses for 1990 do not correlate to all of the subject entries. In other words, it is most likely that merchandise contained in a 1990 entry was actually sold in 1991 or even later, and warranty claims were actually made in 1992 or even later. As such, the warranty cost and loss data for 1990 bear no direct relationship to the entries made in 1990. And, Samsung offers no evidence, or any indication that it could, to correlate the warranty claims to the date of sale and, in turn, to the subject entries. Without some more concrete temporal connection between the subject entries, and the submitted warranty costs, only vague assumptions can be made about the appropriate allowance for the defects in subject entries.

If the Court were to accept otherwise, it runs the risk of illegally assigning to the protested entries value allowances for merchandise in non-protested entries and, in so doing, would contravene the rule from *Alyeska Pipeline Serv. Co. v. United States*, 10 CIT 510, 643 F. Supp. 1128 (1986), *reh'g granted*, 11 CIT 931 (1987), *vacated as moot on other grounds*, unpublished order (May 19, 1988). In *Alyeska Pipeline*, Customs had advanced the value of merchandise in a single entry to cover value advances (i.e., reappraisements) relating to twenty four additional entries of identical merchandise, including two of which were not before the court. *See* 10 CIT at 515, 643 F. Supp. at 1132. The court rejected this action, finding that "[t]he law does not permit the Customs Service to assign one entry the values of merchandise in other entries or the duties owing to them." *Id.* at 516, 643 F. Supp. at 1132. The court went on to conclude that "a value adjustment to imported merchandise may be reflected only on the entry or entries which cover the imported merchandise. It follows that the only proper value increase for the entry in question would be one reflecting the value of the merchandise covered by that entry and no other merchandise." *Id.* at 516, 643 F. Supp. at 1133. Similarly, it also follows here that a value allowance must relate to the merchandise entered under a specific entry(ies).[3] Instead, Samsung requests that a value allowance be granted to cover allegedly defective merchandise contained in a slew of entries, regardless of the fact that it cannot show which particular entries contained defective merchandise, which contained more or less defective merchandise, and which contained no defective merchandise. The Court cannot grant a blanket allowance when the extent of damage claimed does not actually correspond to the merchandise contained in a particular entry or set of entries.

In addition, the total warranty cost and loss data include the discounted sales made to outside jobbers. The value of discounted sales Samsung made to repurchasers of damaged and refurbished merchandise bears, at best, a remote relation to the difference in value resulting from the defects. Samsung fails to demonstrate that the discounted price is an accurate measure of the extent of damage. To establish an appraisal by clear and convincing evidence, there must be some way to segregate the diminution in value attributable to the damage to the merchandise, from that attributable to other discounts, *e.g.*, volume discounts. *See* HQ 545534 (May 15, 1995) (rejecting an allowance for defec-

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[3] Samsung argues against the entry-by-entry approach, noting that the value statue allows Customs to allocate the costs of assists over as many entries as are impacted by the assist and, hence, Customs should also be allowed to allocate an allowance in value for defective merchandise over more than one entry. *See* Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J., at 14–15 ("Assists" are defined, *inter alia*, as materials, components, parts, tools, or artwork supplied free of charge by the buyer of the imported merchandise. *See* 19 U.S.C. § 1401a(h)(1)(A)). Yet, Samsung neglects to note that while the value statute expressly provides for the apportionment of assists, the statute is silent with respect to apportionment of value allowances for defective merchandise. *See* 19 U.S.C. § 1401a(b)(1)(C) ("The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to * * * the value, apportioned as appropriate, of any assist."). In this case, it is impossible for Samsung to tie the extent of damage due to the defects to the subject entries with any particularity. Yet, in those cases where it is possible to show that the amount of damage claimed actually relates to a particular set of entries, the Court takes no position on whether it is ever permissible for Customs to calculate an allowance for defective merchandise using an allocation methodology.

tive merchandise under section 158.12 based on the difference between the original sale price and the resale price because there was no evidence to suggest that the discount bore any relation to the extent of damage).

In sum, Samsung fails to show that it is possible to link the diminution in value due to defects in specific merchandise to any particular entry(ies). Hence, it is impossible to calculate an appropriate allowance in value for the defective merchandise. Accordingly, even if the Court were to accept that Samsung has established which entries contained defective merchandise at the time of importation, the Court still would grant summary judgment to defendant because Samsung cannot establish an appropriate allowance by clear and convincing evidence.

V.

CONCLUSION

For the foregoing reasons, Customs' decision not to grant plaintiff an allowance for defective merchandise is sustained, and summary judgment is granted in favor of defendant. Judgment will be entered accordingly.

(Slip–Op. 99–4)

MITA COPYSTAR AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–03–00159

(Dated January 6, 1999)

AMENDED JUDGMENT ORDER

GOLDBERG, *Judge:* In accordance with the decision (November 6, 1998) and mandate (December 28, 1998) of the United States Court of Appeals for the Federal Circuit, Appeal No. 98–1203, reversing this Court's decision in *Mita Copystar America v. United States*, 21 CIT ____, 994 F. Supp. 393, Slip Op. 98–2 (January 9, 1998) *("Mita")*, it is hereby

ORDERED that this Court's Opinion and Order in *Mita*, holding that Customs properly classified toner cartridges under HTSUS subheading 3707.90.30, is vacated; and it is further

ORDERED that Customs shall reliquidate the aforementioned subject merchandise under HTSUS subheading 9009.90.00 as "parts and accessories of electrostatic photocopying apparatus," in accordance with the Federal Circuit's decision and mandate. Customs shall refund all excess duties paid with interest as provided by law.

(Slip Op. 99–5)

CRESCENT FOUNDRY CO. PVT. LTD., NANDIKESHWARI PVT. LTD., CARNATION ENTERPRISES PVT. LTD., KEJRIWAL IRON & STEEL WORKS, OVERSEAS IRON FOUNDRY PVT. LTD., RAGHUNATH PRASAD PHOOLCHAND LTD., R.B. AGARWALLA & CO., RSI (INDIA) PVT. LTD., SERAMPORE INDUSTRIES PVT. LTD., SITARAM MADHOGARHIA & SONS PVT. LTD., SUPER CASTINGS (INDIA), TIRUPATI INTERNATIONAL (P) LTD., UMA IRON & STEEL CO., AND KAJARIA IRON CASTINGS PVT. LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY CO., DEETER FOUNDRY, INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, INC., DEFENDANT-INTERVENORS

Court No. 95–09–01239

(Dated January 8, 1999)

ORDER

DICARLO, *Senior Judge:* In conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit, it is hereby

ORDERED that this action is remanded to the United States Department of Commerce, International Trade Administration for further proceedings in conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit; and it is further

ORDERED that Commerce shall file its remand results with the court within 45 days of the date of this order; and it is further

ORDERED that any party contesting the remand results shall file comments with the court within 30 days of the remand results.

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